No. 95-6556-CFY Title: Johnny Lynn Old Chief, Petitioner
v.
United States

Docketed: October 31, 1995 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Oct 30 1995	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 2, 1996)
	Nov 20 1995	Order extending time to file response to petition until January 2, 1996.
	Dec 29 1995	Brief of respondent United States in opposition filed.
	Jan 11 1996	DISTRIBUTED. February 16, 1996
	Feb 20 1996	Petition GRANTED. SET FOR ARGUMENT October 16, 1996. **********
	Mar 25 1996	Joint appendix filed.
	Mar 29 1996	Brief of petitioner Johnny Lynn Old Chief filed.
	Apr 5 1996	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Apr 30 1996	Order extending time to file brief of respondent on the merits until May 13, 1996.
	May 13 1996	Brief of respondent United States filed.
	Jun 12 1996	Reply brief of petitioner filed.
	Jul 31 1996	Record filed.
	Aug 6 1996	Record filed.
	Aug 20 1996	CIRCULATED.
	Oct 16 1996	ARGUED.

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

95-6556

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANTHONY R. GALLAGHER
Chief Federal Defender
*DANIEL DONOVAN
Assistant Federal Defender
Federal Defenders of Montana
9 Third Street North, Suite 302
Great Falls, Montana 59401
(406) 727-5328

*Counsel of Record

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The Petitioner, Mr. Johnny Lynn Old Chief, respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is unreported. The Order of the Court of Appeals denying a Petition for Rehearing and rejecting the Suggestion for Rehearing *En Banc* (App. B) is likewise unreported.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 5, 1995. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on August 2, 1995. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 18 U.S.C. §922(g)(1), Felon in Possession of a Firearm, are replicated at App. C. Although not specifically raised below, Mr. Old Chief's argument necessarily implicates his constitutional rights to Due Process and to a Trial by a Fair and Impartial Jury. Therefore, the relevant provisions of the Fifth and Sixth Amendments to the United States Constitution are reproduced at App. D.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. Introduction

The Ninth Circuit Court of Appeals denied Petitioner Johnny Lynn Old Chief's (hereinafter referred to as Mr. Old Chief) appeal of his conviction. Mr. Old Chief was convicted of Felon in Possession of a Firearm, Using or Carrying a Firearm During Commission of a Violent Crime, and Assault With a Dangerous Weapon, felonies, in violation of 18 U.S.C. §922(g), 18 U.S.C. §924(c) and 18 U.S.C. §1153 and 113(c). The Ninth Circuit affirmed the conviction but vacated the sentence and remanded for resentencing. Mr. Old Chief has now been resentenced. Sentencing is not an issue in this Petition.

2. Course of the Proceedings

On February 18, 1994, Mr. Old Chief appeared in Court and pled "Not Guilty" to the offenses alleged in the Indictment. After Mr. Old Chief's Arraignment, various pretrial matters were raised. The Defense filed Pretrial Motions, including a Motion in Limine and a Motion to Compel Fingerprint Evidence Examination. The District Court held a hearing on the Pretrial Motions and denied the Motion in Limine and the Motion to Compel Fingerprint Evidence Examination.

A jury trial was held on June 13 and 14, 1994. The jury returned a verdict of guilty to all three counts on June 14, 1994. Having received a Presentence Investigation Report, the District Court held the Sentencing Hearing on July 26, 1994. The District Court sentenced Mr. Old Chief to a term of 15 years (180 months) of imprisonment, to be followed by three (3) years of supervised release.

3. Disposition in the District Court

a. Original Sentence

Mr. Old Chief was committed to the custody of the Bureau of Prisons to be imprisoned for a term of 15 years (180 months). This term consists of 120 months on Count I and 60 months on Count III, the terms to run concurrently. A term of 60 months on Count II is to run consecutively with the terms imposed on Counts I and II. This 15-year term of imprisonment is to be followed by placement on supervised release for a period of 3 years.

b. Sentence on Remand

On remand, the District Court imposed sentence identical to the one originally imposed: 15 years to be followed by 3 years of supervised release. Mr. Old Chief has instituted an appeal

of his second sentence to the Ninth Circuit Court of Appeals. This appeal is presently pending and does not impact the issues raised here.

4. Disposition in the Court of Appeals

Mr. Old Chief appealed both his conviction and his sentence to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the conviction, vacated the sentence and remanded the case for resentencing. The issue here was specifically raised by Mr. Old Chief and denied by the Ninth Circuit Court of Appeals. See Appendix A at pp. 2a-3a.

B. STATEMENT OF THE FACTS

1. The Underlying Events

As the prosecution stated during summation, "[e]verybody seemed to be drinking. All the witnesses seemed to be drinking and drinking heavily." The events in this case occurred on October 23, 1993 in Browning, Montana on the Blackfeet Indian Reservation. Three separate groups of people were involved. The incidents occurred at two different locations, Ick's Bar and the old Exxon gasoline station.

Four people - Stacey Everybody Talks About, Stephanie Spotted Eagle, Jess Wesley Crawford and the Defendant, Johnny Old Chief, were riding around the Browning area during the day in a pickup truck. The pickup was owned by Ms. Everybody Talks About's boyfriend, Marvin England, and Ms. Everybody Talks About did all the driving. Various purchases of alcohol were made. In particular, the driver, Ms. Everybody Talks About, was drinking beer to the point that she cannot remember how many beers she had because she drank so many.

Later in the day, Mr. Crawford, a paraplegic, got tired and asked to be dropped off at his home. Mr. Crawford, a car dealer, had a bank bag of money and a 9mm pistol under the

seat of the pickup. After Mr. Crawford was dropped off, the pistol was left under the seat of the pickup by mistake.

The gun belonged to Mr. Crawford. It was placed under the seat of the pickup by Ms. Everybody Talks About. Mr. Old Chief was not aware that the gun was there. Mr. Crawford never told Mr. Old Chief that the gun was there.

Sometime after dropping Mr. Crawford off, the three others got back together in the same pickup, with Ms. Everybody Talks About still driving. They parked the vehicle in front of Ick's Bar. Subsequently, another vehicle, a Suburban, pulled up with two individuals, Anthony Calf Looking and Louis Reevis.

Mr. Calf Looking and Mr. Reevis had been drinking all weekend. Mr. Calf Looking testified that they "drank a couple of cases of beer that day" and, as a result, he "can't remember too much." Mr. Reevis said that he had been "kind of drunk all weekend," that he had been on a drinking binge. Mr. Reevis admitted that, having drank beer and whiskey, he did not have a clear memory of the events which occurred in front of Ick's Bar.

Because he was drunk, Mr. Calf Looking picked a fight with Mr. Old Chief. Mr. Calf Looking stated, "Who wants to fight" and "You think you are tough?" He then hit Mr. Old Chief and knocked him to the ground. Mr. Calf Looking took off running. After he had gotten across the street, he heard a gun shot. Notably, Mr. Calf Looking does not think that the shot came in his direction at all.

No one, except Ms. Everybody Talks About, claimed to have seen Mr. Old Chief with the gun. Mr. Calf Looking never saw Mr. Old Chief with a gun. Mr. Reevis never saw Mr. Old Chief with a gun. Ms. Spotted Eagle admitted that she was the one who grabbed the gun

from under the seat and shot the gun, not Mr. Old Chief. The next day, Ms. Everybody Talks About told Mr. Crawford that Mr. Old Chief had gotten into a fight and that she fired Mr. Crawford's pistol.

The three, Stacey Everybody Talks About, Stephanie Spotted Eagle and Johnny Old Chief, left Ick's Bar in the pickup and drove to the old Exxon station nearby. They parked and, within minutes, a vehicle with Marvin England and Kim Radasa pulled up. Mr. England had been drinking with Mr. Radasa "all day and night." Mr. Radasa had been drinking for two days and the two of them had consumed a case and one-half of beer by the time they got to the old Exxon station. At the old Exxon station, Mr. England and Mr. Radasa heard a shot go off, but did not see Mr. Old Chief with a gun. Ms. Everybody Talks About gave conflicting testimony. At one point, she testified that Mr. Old Chief fired one shot in the air at the old Exxon station. Later, she admitted that she did not see Mr. Old Chief fire a shot there. According to Ms. Spotted Eagle, the gun was in the pickup where Ms. Everybody Talks About had put it back under the seat. As Ms. Everybody Talks About was unloading the gun at the old Exxon building, the gun discharged.

Mr. Old Chief did not make a statement, nor did he testify. However, four bullets and one shell casing were found in his pocket. A latent fingerprint was discovered on the magazine of the pistol.

This fingerprint did not match the known fingerprints of Mr. Old Chief nor the known fingerprints of Ms. Spotted Eagle or Mr. Crawford. No comparison was ever made of this latent fingerprint to the known fingerprints of Ms. Everybody Talks About or anyone else

involved in these incidents, except Mr. Old Chief, Ms. Stephanie Spotted Eagle and Mr. Crawford.

2. Statement of Facts Relevant to The Petition

Mr. Old Chief was convicted of Count I: Felon in Possession of a Firearm, Count II: Using or Carrying a Firearm During Commission of a Violent Crime, and Count III: Assault With a Dangerous Weapon, felonies, in violation of 18 U.S.C. § 922(g), 18 U.S.C. § 924(c) and 18 U.S.C. § 1153 and 113(c), respectively. In support of the Felon in Possession charge, Count I specifically alleges that Mr. Old Chief has been convicted of one felony crime, to-wit: "...having been convicted of a felony crime punishable under the laws of the United States for a term of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States District Court in and for the District of Montana, on the 28th day of September, 1989."

Prior to trial, Mr. Old Chief moved the District Court in limine to order the prosecution to refrain from mentioning - by reading the Indictment, during jury selection, in opening statement, or closing argument - and to refrain from offering into evidence or soliciting any testimony from any witness regarding Mr. Old Chief's prior criminal conviction, except to state that he has been convicted of a crime punishable by imprisonment exceeding one (1) year. Mr. Old Chief argued, to the District Court and on appeal, that the jury would be, and was, unfairly influenced to convict Mr. Old Chief of Assault With a Dangerous Weapon (Count III) and Using or Carrying a Firearm During Commission of a Violent Crime (Count II) upon having been informed that he was previously convicted of Assault Resulting in Serious Bodily Injury.

Mr. Old Chief was willing to solve the problem by stipulating, agreeing and requesting the District Court to instruct the jury that he has been convicted of a crime punishable by

imprisonment exceeding one (1) year. See Defendant's Proposed Jury Instruction No. 7 (Appendix E at p. 15a). He thus admitted that the Government had proven one of the essential elements of the offense of Count I: Felon in Possession of a Firearm and the District Court would have instructed the jury that this element was proven. He contended that the evidence was thus irrelevant and prejudicial and that there was absolutely no need to inform the jury of the nature of the prior felony conviction. After hearing argument, the District Court denied the Motion in Limine.

This issue was presented as Mr. Old Chief's first issue on appeal to the Ninth Circuit. The panel rejected the argument holding that "the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge." See Appendix A at p. 3a.

REASONS TO GRANT PETITION

THE DEFENDANT IN A FELON IN POSSESSION OF FIREARM CASE SHOULD BE PERMITTED TO STIPULATE TO HIS FELON STATUS. OTHERWISE, THE GOVERNMENT IS ALLOWED TO INTRODUCE EVIDENCE OF THE NATURE OF THE PRIOR FELONY WHICH IS HIGHLY PREJUDICIAL AND IRRELEVANT.

1. EVIDENCE OF THE DEFENDANT'S PRIOR FELONY CONVICTION IS PREJUDICIAL AND IRRELEVANT IN A FELON IN POSSESSION OF FIREARM CASE

Evidence of the defendant's prior felony conviction is prejudicial in a felon in possession of firearm (18 U.S.C. §922(g)(1) - App. C) case. Where the defendant is willing to stipulate to his felon status, the defendant's prior felony conviction is totally irrelevant and unnecessary.

One of the elements of the offense of felon in possession of firearm is that, at the time the defendant possessed the firearm, the defendant had been convicted of a felony. 18 U.S.C. §922(g)(1). Thus, in every case, the Government must prove beyond a reasonable doubt that the defendant has a prior felony conviction.

Evidence of the prior conviction, even the name of the crime of conviction, by itself is inherently prejudicial. Evidence is prejudicial if it "appeals to the jury's sympathies, arouses its sense of horror, provokes its instincts to punish, or triggers other mainsprings of human action...." 1 Weinstein's Evidence §403[3], pp. 37-41. "Unfair prejudice" means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, Notes of Advisory Committee.

Once the jury is told that the defendant has a prior felony conviction, the defendant is prejudiced -- the jury thinks that because he has been convicted before, he is likely to have committed another crime. This is the logic behind Fed. R. Evid. 609 which allows the

credibility of a witness, including a defendant, to be impeached by evidence of a prior conviction -- if he's been convicted before, you cannot believe him now.[1] In a felon in possession of firearms case, this prejudice becomes unfair when the name and nature of the prior felony conviction are brought to the jury's attention. In other words, it is bad enough that the jury is told that the defendant has a prior felony conviction but it is worse when the name and underlying facts of that conviction are presented to the jury.

As stated in the concurring opinion in United States v. Blackburn, 592 F.2d 300, 302 (6th Cir. 1979):

> Disclosure of the nature of prior felony convictions makes it difficult to assure an accused a fair and impartial jury. Without doubt, it places an unnecessary burden upon the presumption of innocence. The government cannot justify the need for routinely referring to the nature of the prior felony convictions in the indictment.

Can a jury really presume that the accused is innocent when it is told, at the beginning of the trial, that the accused is already a convicted felon?

Many courts have recognized that this unfair prejudice cannot be overcome by limiting instructions. As stated by the District of Columbia Circuit in United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985):

> To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities. In such cases, it becomes particularly unrealistic to expect effective execution of the "mental gymnastic" required by limiting instructions, *Nash v. United States*, 54 F.2d 1006, 1007 (2nd Cir.) (Learned Hand, J.) *cert. denied*, 285 U.S. 556, 52 S.Ct. 457, 76 L.Ed. 945 (1932), and "the naive assumption that prejudicial effects can be overcome by instructions to jury" becomes more clearly than ever "unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949) (Jackson, J., concurring). As the Third Circuit has observed, once evidence of prior crimes reaches the jury, "it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk." *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 283 (3rd Cir. 1975); *accord*, *United States v. Carter*, 482 F.2d 738, 740 (D.C. Cir. 1973). (Emphasis added).

A district court can keep that drop of ink from spreading by accepting a defendant's offer to stipulate and requiring the Government to agree to the stipulation.[2] The jury thus hears of the defendant's felony status and nothing more. The degree of prejudice is limited.

The First Circuit, in United States v. Tavares, 21 F.3d 1 (1st Cir. 1994), recently reversed its rule which allowed the Government to reject the defendant's offer to stipulate to the fact that he had a prior felony conviction. The First Circuit held that the Government was required to accept the defendant's stipulation to his status as a felon and could not introduce evidence of the nature of the prior felony absent special circumstances. 21 F.3d at 4-6. While the First Circuit recognized the inherent prejudice of evidence of the prior felony, noting that there existed "no reason, other than the government's decision to color the jury's perception of the defendant's character, for revealing the nature of the defendant's prior felony,"[3] the court

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[1] Under Rule 609, a defendant can keep evidence of his prior felony conviction out of consideration by choosing to not testify. Only by testifying does a defendant expose himself to impeachment. See United States v. Booker, 706 F.2d 860, 862 (8th Cir. 1983).

[2] There are other possible remedies besides stipulation to felony status including severance and bifurcation. See, e.g., United States v. Jones, 16 F.3d 487, 492-493 (2nd Cir. 1994). However, in the case at bar, Mr. Old Chief sought only the remedy of stipulation.

[3] Evidence of a prior crime that is particularly egregious, socially opprobrious, systematically dangerous or similar to the present prosecution would be "highly likely [to] influence the jury's perception of the defendant, suggesting that he is a sufficient threat to

hinged its decision on the fact that the nature of the prior felony conviction is not probative or relevant:

> The fact concerning defendant's prior criminal record that §922(g)(1) explicitly makes "of consequence" is whether it includes a crime carrying a penalty of more than a year's imprisonment. It does not embrace additional facts such as a particular kind of felony. Congress required no gradation for seriousness, numerosity or recency, although such distinctions have in other contexts been given significance. *See, e.g.*, 18 U.S.C. §924(c) (penalizing use of firearm in connection with crime of violence or drug trafficking crime); §924(e)(1) (increasing firearms possession penalty for defendant convicted of multiple violent felonies or "serious" drug offenses).

21 F.3d at 4.

In sum, evidence of the nature of the defendant's prior conviction in a felon in possession of firearm case is obviously prejudicial and clearly irrelevant. If a district court ignores this prejudice by refusing to remedy it, the defendant's right to a trial by a fair and impartial jury is seriously infringed.

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society to warrant additional incarceration." 21 F.3d at 4.

2. THE CIRCUITS ARE SPLIT ON THE QUESTION OF WHETHER THE GOVERNMENT CAN BE REQUIRED TO STIPULATE TO THE DEFENDANT'S FELONY STATUS

Some of the Circuits (1st, 4th, 5th and 7th) have held that the Government should be required to stipulate that a defendant has a felony conviction and then be precluded from presenting any evidence about the conviction. Others (2nd, 3rd, 6th, 8th, and 9th[4]) have held that the Government cannot be forced to stipulate. Three other circuits (10th, 11th and D.C.) suggest that the trial court has the discretion either to require the Government to stipulate or to fashion an alternative remedy such as severance.

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[4] There is also a conflict within the Ninth Circuit. See United States v. Barker, 1 F.3d 957, 959 n.3 (9th Cir. 1993) and United States v. Breitkreutz, 8 F.3d 688, 692 (9th Cir. 1993). This conflict has been recognized by the First Circuit in Tavares. See 21 F.3d at 5. In his concurring opinion in Breitkreutz, Circuit Judge Norris highlighted the conflict as follows:

> Barker held that a prosecution for the offense of being a convicted felon in possession of a firearm may not be bifurcated into two separate proceedings, one for each element of the offense, because the government must be permitted to prove each element to a jury. Unlike the majority in this case, however, Barker makes clear that while the government may put on evidence "proving an essential element of the charged offense," Id. at 959 (citing United States v. Campbell, 774 F.2d 354, 356 (9th Cir. 1985)), it may not inform the jury of the facts underlying the defendant's prior conviction, because they are not probative of whether the defendant is a convicted felon.
>
> The majority creates a conflict not only with Barker, but also with the Fourth Circuit, which has held that once a defendant offers to stipulate to his status as a convicted felon, the prosecution may not put on evidence of the nature of the prior felony. See United States v. Poore, 594 F.2d 39, 41-43 (4th Cir. 1979) (requiring prosecution to strike reference in indictment to nature of defendant's prior felony conviction after defendant offered to stipulate to his status as convicted felon).

8 F.3d at 694-695.

The First Circuit in United States v. Tavares, 21 F.3d 1, 5 (1994) summarizes the positions of the various circuits. We have updated this and have provided a list set forth in Appendix F.

The Circuits which hold that the Government cannot be forced to stipulate to the prior felony are clearly wrong. "[W]here there exists no reason, other than the government's desire to color the jury's perception of the defendant's character, for revealing the nature of the defendant's prior felony" to the jury, the trial court must be given the power to limit the evidence to the essential fact, and no more, that there is a prior felony conviction. 21 F.3d at 5.

If a defendant offers to stipulate to his felony status, he should not be precluded from so doing simply because he allegedly committed the offense of felon in possession of firearm in the wrong district. A rule of fairness and justice in the 1st, 4th, 5th and 7th Circuits becomes a rule of unfairness and injustice in the 2nd, 3rd, 6th, 8th and 9th Circuits. This Court should grant certiorari in order to make the rule uniform in all courts of the United States, i.e., that the Government be required to accept a defendant's stipulation to his felony status and be precluded from introducing evidence of the nature of the prior felony absent special circumstances.

3. THE INTRODUCTION AND ADMISSION INTO EVIDENCE OF MR. OLD CHIEF'S PRIOR ASSAULT CONVICTION WAS PREJUDICIAL, NOT PROBATIVE, WHERE THE DEFENSE AGREED TO STIPULATE THAT HE HAD A PRIOR FELONY CONVICTION AND HE WAS CHARGED WITH ASSAULT WITH A DANGEROUS WEAPON

The primary charge against Mr. Old Chief was Assault With a Dangerous Weapon (Count III) in violation of 18 U.S.C. §113(c). However, Count I, the Felon in Possession of Firearm charge, specifically alleged that Mr. Old Chief had previously been convicted of Assault Resulting in Serious Bodily Injury. How could the jury objectively and impassionately weigh

the evidence with respect to Count III knowing that Mr. Old Chief had already committed a Felony Assault?

Mr. Old Chief was willing to solve the problem by stipulating, agreeing and requesting the District Court to instruct the jury that he has been convicted of a crime punishable by imprisonment exceeding one (1) year. See Defendant's Proposed Jury Instruction No. 7 (App. E at p. 15a). He thus admitted that the Government had proven one of the essential elements of the offense of Count I: Felon in Possession of a Firearm and the District Court would have instructed the jury that this element was proven. The evidence was thus irrelevant and there was absolutely no need to inform the jury of the nature of the prior felony conviction.

The Government refused to stipulate and the District Court decided that it would not force the Government to stipulate. The District Court ignored the obvious -- the fact that there was an assault conviction was not probative. All that the pertinent section, §922(g)(1), requires is a felony conviction. Mr. Old Chief admitted that he had a felony conviction and requested that the jury be so instructed. This fact was not contested and the element was no longer at issue. As stated in United States v. Tavares, supra, the remedy is simple:

> ...because the nature of the predicate felony is wholly unrelated to the crime for which the defendant is on trial, excluding the extraneous information concerning its nature should create no burden for either the court or the government. The defendant's unadorned stipulation could be read to the jury or, if the government preferred, a redacted judgment of conviction could be introduced into evidence. Severing the admissible evidence from the inadmissible thus would require neither sensitive nor difficult judgments.

21 F.3d at 4-5.

The element required to be proven for Felon in Possession of a Firearm was that Mr. Old Chief had been convicted of a felony. There was no need to tell the jury that the particular felony was Assault Resulting in Serious Bodily Injury. Because the Government was allowed to introduce and present evidence of the prior assault conviction, it is likely that the jury convicted Mr. Old Chief based on his past misconduct rather than on proof beyond a reasonable doubt of the present charges.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED this 17th day of October, 1995.

ANTHONY R. GALLAGHER
Chief Federal Defender for the
District of Montana
*DANIEL DONOVAN
Assistant Federal Defender
Federal Defenders of Montana
Suite 302, The Liberty Center
#9 Third Street North
Great Falls, Montana 59401
(406) 727-5328

*Counsel of Record

APPENDIX A

OPINION

OF THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

JUNE 5, 1995 (UNREPORTED)

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHNNY LYNN OLD CHIEF,

Defendant-Appellant.

No. 94-30277

D.C. No. CR-94-03-GF-PGH

MEMORANDUM*

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted April 14, 1995
Seattle, Washington

Before: **WRIGHT**, **POOLE** and **WIGGINS**, Circuit Judges.

Johnny Lynn Old Chief ("Old Chief") appeals his criminal convictions rendered by jury verdict in the federal district of Montana. Old Chief was convicted of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon. The offenses charged took place on an Indian reservation, thus violating 18 U.S.C. § 1153.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Old Chief appeals on five grounds: (1) that the district court erred by allowing the prosecution to introduce extrinsic evidence of his prior felony conviction despite his offer to stipulate to his felon status; (2) that the district court erred by not ordering the prosecution to conduct fingerprint comparisons of all witnesses and individuals present at the scene of the offenses; (3) that his convictions on the assault charge and use enhancement were not supported by substantial evidence; (4) that the district court erred by not conducting a post-verdict evidentiary hearing regarding jury misconduct; and (5) that the district court improperly imposed a 57-month upward departure on his unlawful possession sentence in violation of the federal sentencing guidelines. For the reasons set forth below, we affirm Old Chief's convictions; however, we reverse his sentence and remand for resentencing.

I. INTRODUCTION OF OLD CHIEF'S PRIOR FELONY CONVICTION.

We review the district court's decision to admit or exclude evidence for an abuse of discretion. United States v. Mullins, 992 F.2d 1472, 1476 (9th Cir. 1993). Prior to trial, Old Chief made an offer to stipulate to his status as a convicted felon. He argued that introduction of his prior felony assault conviction to prove the element of the unlawful possession charge would be unduly prejudicial. The prosecution refused to stipulate, and the district court denied Old Chief's motion.

Regardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence. See United States v. Breitkreutz, 8 F.3d 688, 690 (9th Cir. 1993)(citing United States v. Gilman, 684 F.2d 616, 622 (9th Cir. 1982)). Under Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 balancing process. Breitkreutz, 8 F.3d at 691-92.

Old Chief argues that our decision here is controlled by that in United States v. Hernandez, 27 F.3d 1403 (9th Cir. 1994), cert. denied, 115 S.Ct. 1147 (1995). But Hernandez stands for the proposition that a defendant's stipulation to a prior felony is sufficient evidence to fulfill the requisite element of § 922(g)(1). It cannot be read for the quite different proposition that a defendant's stipulation to a prior felony must always be accepted to prove the requisite element of § 922(g)(1).

Thus, we hold that the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge.

II. REFUSAL TO COMPEL THE PROSECUTION TO CONDUCT FINGERPRINT COMPARISONS.

A district court's decision as to alleged Brady violations is reviewed de novo. United States v. Woodley, 9 F.3d 774, 777 (9th Cir. 1993). The law of the Ninth Circuit is unequivocal on this point: "[t]he prosecution is under no obligation to turn over

materials not under its control." See United States v. Dominguez-Villa, 954 F.2d 562, 566 (9th Cir. 1992)(quoting United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991)).

Here, the one latent fingerprint "of value" was recovered from the bullet clip of the weapon used in the assault. Old Chief argues that, once it was determined that the latent fingerprint on the bullet clip did not match his known prints, the district court should have compelled the prosecution to conduct fingerprint comparisons of all the witnesses at the scenes of the offenses. Specifically, he contends that if the comparison resulted in a match between the latent print and the prosecution's key witness, that witness's crucial testimony would have been substantially impeached. Old Chief, however, did have access to the results of the fingerprint analysis that was conducted by the prosecution.

Consistent with its Brady obligations, the prosecutor turned over the potentially exculpatory results of the fingerprint analysis conducted for Old Chief and his two defense witnesses that claimed to have had contact with the gun on the day of the assault. Old Chief argued this lack of fingerprint evidence in his defense.

What Old Chief argues now, in sum, is that the prosecution's failure to obtain its own witness's fingerprints for comparison precluded and impaired his ability to present his defense. Old Chief's request, however, was tantamount to forcing the prosecution to secure evidence, not already in its possession, for use in the impeachment of its own witness. This is not required under Brady or Dominguez-Villa.

III. SUFFICIENCY OF EVIDENCE ON THE ASSAULT CHARGE AND USE ENHANCEMENT.

In determining whether the evidence was sufficient to support a conviction, we must determine whether, viewing all the evidence in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt of each essential element of the crimes charged. Jackson v. Virginia, 443 U.S. 307, 320 (1979); United States v. Lennick, 18 F.3d 814, 819 (9th Cir. 1994).

Old Chief argues that there was insufficient evidence to convict him on the assault charge and, therefore, the use enhancement. Specifically, he argues that, assuming he did fire the shot at the victim, Anthony Calf Looking, there was no evidence that he acted with specific intent to do bodily harm, nor that the gunshot caused Calf Looking to fear immediate bodily harm.

The only uncontroverted occurrence regarding the assault is that the victim, Calf Looking, provoked the fight with Old Chief. Only one witness testified at trial that she actually saw Old Chief point the gun directly at Calf Looking and fire in his direction.

Once on the stand, Calf Looking apparently began to retreat from his earlier statements to the police. However, the prosecution witness's version of the events was corroborated by the investigating officer's testimony regarding his interview with Calf Looking the morning after the incident. Thus, despite the fact that the investigating officer's testimony impeaching Calf Looking

may not be substantive evidence, it tends to bolster the direct testimony of the prosecution's key witness. Moreover, Calf Looking testified that he heard the shot, and that he ran because he "must have been scared" of Old Chief.

In addition, a rational fact finder could conclude that the testimony offered by Old Chief's two defense witnesses was not credible. Given the inconsistencies between the witnesses' accounts of the day's events, a rational fact finder could reasonably disregard both their testimony in favor of that of the prosecution witness. Thus, considering the prosecution witness's testimony, and Calf Looking's statements regarding his fear of Old Chief, a rational trier of fact could find sufficient evidence to convict Old Chief on the assault charge.

IV. REFUSAL TO CONDUCT A POST-VERDICT EVIDENTIARY HEARING.

A district court's denial of a motion for a post-verdict evidentiary hearing is reviewed for an abuse of discretion. United States v. Langford, 802 F.2d 1176, 1180 (9th Cir. 1986), cert. denied 483 U.S. 1008 (1987). Old Chief argues that the district court should have conducted such a hearing to determine whether one juror's question to the judge and a second juror's whispers during the jury poll improperly influenced the jury's deliberations.

Despite Old Chief's attempt to characterize the whispers of one juror to another during the jury poll as an "outside influence," he made no showing of improper external influence sufficient to warrant a post-verdict evidentiary hearing. See Tanner

v. United States, 483 U.S. 107, 127 (1987)(holding that district court did not err in deciding that a post-verdict hearing was unnecessary, despite juror's allegations of excessive alcohol consumption and illegal drug use during deliberations).

This Court has held that "where a trial court learns of a possible incident of jury misconduct, it is preferable to hold an evidentiary hearing 'to determine the precise nature of the extraneous information,' [internal citations omitted] [however,] not every allegation that extraneous information has reached the jury requires a full-dress hearing." United States v. Langford, 802 F.2d 1176, 1180 (9th Cir. 1986)(emphasis added). Under Tanner and Langford, the jury's exposure or access to improper external influence guides the decision whether a court should conduct a post-verdict evidentiary hearing.

Here, the juror's rather innocuous question to the court during the poll-- and the other juror's "urging," if any,--did not imply any improper external influence on the jury's deliberations. Thus, the district court acted within its discretion in declining to contact the juror in order to hold a post-verdict evidentiary hearing.

V. IMPOSITION OF A 57-MONTH UPWARD DEPARTURE TO A TOTAL SENTENCE OF 120 MONTHS ON THE UNLAWFUL POSSESSION CHARGE.

Finally, Old Chief argues that the district court made an unreasonable upward departure in his sentence on the unlawful possession charge, thus, violating the Sentencing Reform Act of 1984

and the Sentencing Guidelines. Old Chief's arguments on this issue have merit.

Because this was his third felony assault conviction in federal court, Old Chief was designated a "career offender." Given this designation and the levels of his current offenses, the maximum sentence Old Chief could have received under the Guidelines was 51-63 months. The district court, however, departed upward to a sentence of 120 months, imposing an additional 57-month sentence on the unlawful possession count. The term of 60 months on the assault charge, was to be served concurrently. Thus, in effect, what should have been a five-year sentence, became a ten-year sentence. Moreover, the Guidelines impose a mandatory five-year enhancement on the "use" conviction, which the judge ordered to be served consecutively.

This Court established a three-step process for the review of an upward departure from the Sentencing Guidelines in United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991)(en banc). First, the reviewing court must determine if the district court had legal authority to depart. Id. at 746. Second, any factual findings supporting the existence of an aggravating circumstance used to support an upward departure must be reviewed for clear error. Id. Third, the extent of the upward departure must be reasonable in light of the structure, standards and policies of the Guidelines. Id. at 751.

Apparently, the district court based its upward departure on the reports of the Probation Officer and U.S. Attorney that Old Chief's serious record as a juvenile offender was not reflected in

his current offender designation. An upward departure is warranted when "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct." See United States v. Streit, 962 F.2d 894, 903 (9th Cir. 1992). However, the district court "must specify the events in the defendant's criminal history that it believes are inadequately represented in the guidelines criminal history calculation." Id. (citing United States v. Hoyungowa, 930 F.2d 744, 747 (9th Cir. 1991)). The current record is, unfortunately, silent in this regard.[1]

The district court's only statement regarding Old Chief's prior history was that "Mr. Old Chief and I have got [sic] to be friends over the years." Although we might assume that this statement was meant to be an adoption of the specific factual findings contained in Old Chief's presentence report, see Streit, 962 F.2d at 903, the district court's statements in the current record are too ambiguous to explain the extent of its upward departure. See United States v. Quintero, 21 F.3d 885, 894-95 (9th Cir. 1994).

"In order to facilitate appellate review, the district court must explain in detail the reasons behind the imposition of a particular sentence, analogizing to other Guidelines provisions." Id. at 894 (quoting United States v. Hicks, 997 F.2d 594, 599 (9th Cir. 1993)). Here, the court simply stated ". . .here again we

[1] We commend Assistant United States Attorney Carl Rostad for candidly acknowledging his responsibility as a prosecutor to suggest additional findings to the district court that might assist the court of appeals, especially in sentencing matters.

find that [Old Chief] had just been released from custody very shortly before this occurred. There is the loaded gun. And he is a danger to the community, and a serious danger. I think there's no question about that." Even if we accept these statements as an indication of aggravating factors in support of an upward departure, the district court failed to articulate the specific reasons for the extent of its departure--nearly double the maximum sentence--by analogy to other Guidelines provisions. See Hicks, 997 F.2d at 599.

"If the district court fails to articulate reasons for the extent of departure or if the analogy is not reasonable, [the panel on appellate review] must vacate and remand." Id. (emphasis in original)(quoting Streit, 962 F.2d at 903). Here, because the district court neither articulated the reasons for such an extreme departure, nor analogized the reasons to particular provisions of the Guidelines, we are unable to evaluate the reasonableness of the sentence imposed as required under Lira-Barraza. Thus, we vacate Old Chief's sentence and remand the case for resentencing consistent with the guidelines set forth above.

VI. CONCLUSION

The district court did not abuse its discretion by allowing the prosecution to introduce extrinsic evidence of Old Chief's prior conviction, despite his offer to stipulate. Further, the district court did not err by refusing to order the prosecution to compare the latent fingerprint found on the weapon clip to the other witnesses at the scene of the offenses. The prosecution satisfied its Brady obligation by providing Old Chief with the

potentially exculpatory evidence that the latent print did not match his known prints.

The evidence was sufficient to support Old Chief's conviction on the assault charge; and, the district court did not abuse its discretion when it refused to conduct a post-verdict evidentiary hearing regarding alleged jury misconduct. As such, Old Chief's convictions are **AFFIRMED**.

However, because the district court failed to articulate specific reasons for its extreme upward departure by analogy to the federal sentencing guidelines, we vacate Old Chief's sentence and **REMAND FOR RESENTENCING**.

APPENDIX B

ORDER

OF THE

UNITED STATES COURT OF APPEALS

FOR THE

NINTH CIRCUIT

(AUGUST 2, 1995)

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG - 2 1995

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 94-30277
v.	)	D.C. No. CR-94-03-GF-PGH
JOHNNY LYNN OLD CHIEF, Defendant-Appellant.	)	ORDER

Before: **WRIGHT**, **POOLE** and **WIGGINS**, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

Title 18 United States Code Section 922(g)(1)

Felon in Possession of a Firearm

§ 922(g)(1) Felon in Possession of a Firearm

It shall be unlawful for any person --

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

APPENDIX D

CONSTITUTION

OF THE

UNITED STATES

Amendments V and VI

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.....

FIFTH AMENDMENT

No person shall...be deprived of life, liberty, or property, without due process of law....

APPENDIX E

DEFENDANT'S PROPOSED JURY INSTRUCTION NO. 7

INSTRUCTION NO. _____

The phrase "crime punishable by imprisonment for a term exceeding one year" generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.

In hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year.

Defendant's Proposed Instruction No. 7

SOURCE: Devitt, Blackmar, Wolff & O'Malley, Federal Jury Practice and Instructions (4th Ed.) §36.10

"Crime Punishable by Imprisonment for a Term Exceeding One Year" - Defined

APPENDIX F

LIST
OF CASES
FROM ALL THE CIRCUITS

1st Circuit: United States v. Tavares, 21 F.3d 1, 5-6 (1st Cir. 1994) (Government required to accept defendant's stipulation to defendant's status as felon and could not introduce evidence of nature of prior felony absent special circumstances)

2nd Circuit: United States v. Gilliam, 994 F.2d 97, 103 (2nd Cir. 1993) (Government not required to accept stipulation but underlying facts of prior conviction not admissible) But See United States v. Jones, 16 F.3d 487, 492-493 (2nd Cir. 1994) ("[J]oinder of an ex-felon count with other charges requires either severance, bifurcation, or some other ameliorative procedure")

3rd Circuit: United States v. Williams, 612 F.2d 735, 740 (3rd Cir. 1979) (Government is not required to stipulate that the defendant is a convicted felon); See Also United States v. Jacobs, 44 F.3d 1219, 1223-1224 (3rd Cir. 1995) (Felon in possession of firearm defendant was not entitled to bifurcation of element of possession from element of prior conviction so jury could determine possession before learning of defendant's prior conviction); Compare United States v. Busic, 587 F.2d 577, 585 (3rd Cir. 1978), *rev'd on other grounds*, 446 U.S. 398, 100 S.Ct. 1447, 64 L.Ed.2d 381 (1980) (If a defendant is charged with multiple offenses, including one requiring proof of a prior felony conviction, the trial judge should sever the latter offense unless the conviction would be independently admissible with respect to the other charges)

4th Circuit: United States v. Poore, 594 F.2d 39, 41-43 (4th Cir. 1979) (District Court is required to strike the nature of the prior felony conviction from indictment where defendant stipulated that he had previously been convicted of a felony); *affirmed*, United States v. Rhodes, 32 F.3d 867, 875 (4th Cir. 1994) ("[W]hen a defendant offers to stipulate the fact of his prior felony conviction, evidence of the nature of the conviction is irrelevant and should be stricken."); See Also United States v. Milton, 52 F.3d 78, 81 n.7 (4th Cir. 1995) ("[I]f a defendant offers to stipulate to the fact of the prior felony conviction, evidence of the nature of the conviction is irrelevant and will not be admitted.")

5th Circuit: United States v. Spletzer, 535 F.2d 950, 955-956 (5th Cir. 1976) (Where defendant admitted that he had been convicted, district court erred by admitting into evidence a certified copy of defendant's prior judgment of conviction); *affirmed* United States v. Palmer, 37 F.3d 1080, 1084 (5th Cir. 1994) ("After a

stipulation of the fact of a predicate conviction for the felon in possession of a firearm offense, the legal question of status is still a relevant issue; however, the predicate crime is significant only to demonstrate status, and the issue of status does not depend on the probative value of the evidence.")

6th Circuit: United States v. Blackburn, 592 F.2d 300, 301 (6th Cir. 1979) (Trial court did not err by refusing to accept defendant's offer to stipulate to his felony convictions in order to avoid disclosing their nature to the jury)

7th Circuit: United States v. Pirovolos, 844 F.2d 415, 420 (7th Cir. 1988) (The trial judge should not have admitted evidence of the defendant's prior convictions because the defendant's proffered stipulation that he had been convicted of a prior felony was sufficient)

8th Circuit: United States v. Bruton, 647 F.2d 818, 825 (8th Cir. 1981) (The Government is not required to accept a defendant's stipulation to a prior felony conviction in lieu of proof of that element of its case); *affirmed* United States v. Booker, 706 F.2d 860, 862 (8th Cir. 1983) (In felon in possession of firearm case, Government may reject defendant's offer to stipulate to his prior conviction and elect to put on its proof thereof)

9th Circuit: United States v. Barker, 1 F.3d 957, 959 n.3 (9th Cir. 1993), as amended, 20 F.3d 365, 366 n.3 (9th Cir. 1994) ("The underlying facts of the prior conviction are completely irrelevant under §922(g)(1); the existence of the conviction itself is not")

United States v. Breitkreutz, 8 F.3d 688, 692 (9th Cir. 1993) (Rejecting stipulation as an alternative form of proof and noting that the prosecution has the right to refuse to stipulate); United States v. Blackstone, 56 F.3d 1143, 1146 (9th Cir. 1995) ("[T]he government was not required to accept [the defendant's] offer to stipulate to the fact of his prior conviction")

10th Circuit: United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir. 1977) (No abuse of discretion where trial court refused defendant's offer to stipulate that he is a convicted felon -- it is a discretionary matter with the trial court)

11th Circuit: United States v. O'Shea, 724 F.2d 1514, 1516-1517 (11th Cir. 1984) (District Court did not abuse its discretion by refusing to accept the defendant's proffered stipulation because it was likely that defendant's past conviction ultimately would be revealed anyway); See Also United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985) ("This circuit has refused to adopt a per se rule either for or against admission of evidence when that evidence is relevant to an issue to which the defendant offers to stipulate....the offer to stipulate [is analyzed] as one factor in making the Rule 403 determination")

D.C. Circuit: United States v. Dockery, 955 F.2d 50, 54 (D.C. Cir. 1992) (Failure to sever felon in possession of firearm count from drug counts was abuse of discretion where government successfully resisted defense efforts to introduce prior conviction by stipulation or to try count to judge, and repeatedly referred to defendant's prior conviction during trial); see also United States v. Fennell, 53 F.3d 1296, 1301-1302 (D.C. Cir. 1995) (When a felon in possession of firearms charge is tried jointly with drug charges, "the trial court must proceed with a 'high level of care' in order to protect the defendant from the potential for prejudice resulting from the introduction of what would otherwise be inadmissible prior bad acts evidence")

ORIGINAL

No. 95-6556

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHNNY LYNN OLD CHIEF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

13 pp

QUESTION PRESENTED

Whether the district court erred in permitting the government to prove the nature of petitioner's prior felony conviction in support of a charge under 18 U.S.C. 922(g).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

No. 95-6556

JOHNNY LYNN OLD CHIEF, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is unreported, but the judgment is noted at 56 F.3d 75 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1995. A petition for rehearing was denied on August 2, 1995. Pet. App. 12a. The petition for a writ of certiorari was filed on October 30, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Montana, petitioner was convicted of possession of

a firearm by a convicted felon, in violation of 18 U.S.C. 922(g); using and carrying a firearm during a violent crime, in violation of 18 U.S.C. 924(c); and assault with a dangerous weapon, in violation of 18 U.S.C. 1153 and 113(c). He was sentenced to 180 months' imprisonment and three years' supervised release. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-11a.

1. On October 23, 1994, on the Blackfoot Indian Reservation, petitioner and two friends drove to a liquor store to purchase beer. Petitioner had been drinking for most of the day. Anthony Calf Looking and a friend were at the store. Calf Looking, who had also been drinking, started a fight with petitioner and knocked him to the ground. Petitioner produced a 9mm semi-automatic pistol and fired at Calf Looking, who fled the scene. Petitioner and his friends got back in their truck and left the store. Gov't C.A. Br. 2-3.

Several moments later, petitioner stopped at a gas station where he met two other men. Petitioner fired at least one shot in the parking lot. Police officers arrived on the scene and arrested petitioner. The police found the pistol used by petitioner in the truck, and subsequently seized several rounds of 9mm ammunition and a spent 9mm casing from petitioner's pocket. Tr. 190; Gov't C.A. Br. 3-4.

2. Before trial, petitioner offered to stipulate to his status as a convicted felon, arguing that the introduction of his prior felony assault conviction to prove that element of the

unlawful possession charge[1] would be unduly prejudicial under Rule 403 of the Federal Rules of Evidence.[2] The prosecutor refused to stipulate to that element, and the district court denied petitioner's motion in limine. Pet. App. 2a.

3. The court of appeals affirmed petitioner's conviction, but vacated his sentence. Relying on circuit precedent, United States v. Breitkreutz, 8 F.3d 688 (1993), the court of appeals ruled that the government is entitled to prove a defendant's prior felony conviction through the presentation of probative evidence, notwithstanding the defendant's offer to stipulate to his status as a felon. Pet. App. 3a.[3]

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[1] 18 U.S.C. 922(g)(1) makes it a crime for any person:

> who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce, any firearm or ammunition.

[2] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[3] The court of appeals also rejected petitioner's claim that the evidence was insufficient to support his conviction for assault, and held that petitioner's conviction did not violate Brady v. Maryland, 373 U.S. 83 (1963). Pet. App. 3a-6a. The court also upheld the district court's refusal to conduct a post-verdict evidentiary hearing. Id. at 6a-7a. Because it concluded that the district court had made inadequate findings to support its departure upward from the maximum Guidelines sentence, the court of appeals vacated petitioner's sentence and remanded the case for resentencing. Id. at 7a-10a. Petitioner received the same sentence on remand. Pet. 3.

ARGUMENT

Petitioner contends (Pet. 9-16) that the district court erred in permitting the government to introduce evidence of the nature of his predicate felony under 18 U.S.C. 922(g) when he was willing to stipulate that he was a convicted felon. The court of appeals correctly rejected that claim. And while there is disagreement among the courts of appeals regarding whether the government may refuse to stipulate to the existence of a predicate felony in prosecutions under Section 922(g), this case would not be an appropriate vehicle for this Court's review because any error in the introduction of prior-felony evidence was harmless.

1. In United States v. Breitkreutz, supra, the Ninth Circuit held that a district court may admit evidence of the defendant's underlying conviction despite the defendant's willingness to stipulate to his felon status. The court observed that under this Court's decision in Estelle v. McGuire, 502 U.S. 62 (1991), "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." Breitkreutz, 8 F.3d at 690 (quoting Estelle v. McGuire, 502 U.S. at 70). Accordingly, the government is not precluded from introducing evidence to prove the prior conviction simply because the defendant has offered to stipulate to the existence of that conviction. Ibid. As the Ninth Circuit explained, because a stipulation is not evidence, but rather a partial amendment to the defendant's plea, it is not a relevant factor in the balancing process under Rule 403. Id. at

691-692. A contrary result, the court noted, "would defeat the rule against partial guilty pleas in most cases," id. at 692, because in every case in which the defendant offered to stipulate to an element of a charged offense, the prosecution's evidence would have limited probative value beyond that of the stipulation. Ibid.[4]

By contrast, several circuits have held that where the defendant offers to stipulate to his felon status, the probity of evidence regarding the nature of the underlying felony conviction is ordinarily outweighed by the prejudice to the defendant that would be caused by that evidence. See United States v. Jones, 67 F.3d 320 (D.C. Cir. 1995); United States v. Tavares, 21 F.3d 1 (1st Cir. 1995) (en banc) (collecting cases and noting conflict).[5] Those circuits have concluded that the nature of a prior felony is only marginally probative in a Section 922(g) prosecution because the facts underlying the earlier conviction do not constitute an element of the charged offense. Those courts have further reasoned

---

[4] The Eighth and Sixth Circuits have reached similar conclusions. See United States v. Flenoid, 718 F.2d 867, 868 (8th Cir. 1983); United States v. Blackburn, 592 F.2d 300, 301 (6th Cir. 1979); see also United States v. Williams, 612 F.2d 735, 739-740 (3d Cir. 1979) (prosecution under 18 U.S.C. 922(h)(1)), cert. denied, 445 U.S. 934 (1980).

[5] Petitioner contends (Pet. 13 n.4) that there is a conflict within the Ninth Circuit on the issue presented in this case. In United States v. Barker, 1 F.3d 957 (9th Cir. 1993), modified, 20 F.3d 365 (1994), the Ninth Circuit stated in a footnote that proof of the underlying felony in a Section 922(g) prosecution is irrelevant. Id. at 959 n.3. Even assuming that the dicta in Barker conflicts with the more recent holdings in Breitkreutz and the instant case, any conflict within the Ninth Circuit would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901 (1957).

that the prejudicial potential of prior-felony evidence in such cases is great because the jury may infer that the defendant is guilty of a charged offense that is similar in nature to the prior felony. See United States v. Jones, 67 F.3d at 324; United States v. Tavares, 21 F.3d at 5-6.

Other courts have concluded that the decision to admit or exclude evidence of the specific felony of which the defendant was previously convicted is committed to the discretion of the trial judge and should be made on a case-by-case basis. See United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); United States v. O'Shea, 724 F.2d 1514, 1516-1517 (11th Cir. 1984).

In our view, the rule followed by the Ninth Circuit is correct. As the court explained in Breitkreutz, 8 F.3d at 690-692, a defendant's willingness to stipulate to a past conviction does not diminish the probity of direct evidence of that conviction. The government remains both obligated and entitled to prove every element of its case beyond a reasonable doubt. See, e.g., Estelle v. McGuire, 502 U.S. at 69-70; United States v. Flenoid, 718 F.2d 867, 868 (8th Cir. 1983). In the typical prosecution under Section 922(g), documentary evidence in the form of a certified judgment of conviction will ordinarily be the most relevant and probative evidence on that issue. While the government is free to accept a stipulation that would obviate the need for such proof, there is no fixed requirement that it do so rather than introduce relevant evidence on the point. Any potential prejudice can generally be

cured by appropriate limiting instructions. In this case, moreover, the defendant did not seek to have the copy of his prior judgment of conviction that was shown to the jury redacted or otherwise altered to conceal the particular offense of which he was earlier convicted. The introduction of that evidence did not violate Rule 403.

2. In any event, any error in the admission of prior-felony evidence in this case was harmless.[6] See Kotteakos v. United States, 328 U.S. 750, 765 (1940). The district court admonished the jury not to consider petitioner's prior felony conviction as "evidence of guilt of the crime for which the defendant is now on trial." Tr. 317. Petitioner has provided no reason for this Court "to depart from 'the almost invariable assumption of the law that jurors follow their instructions.'" Shannon v. United States, 114 S. Ct. 2419, 2427 (1994) (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)).[7]

---

[6] The circuits that have precluded the introduction of evidence regarding the nature of a prior felony in prosecutions under Section 922(g) have applied harmless error analysis to the use of such evidence. See United States v. Jones, 67 F.3d at 325 (applying harmless error analysis, but concluding that the error was not harmless under the facts of the case); United States v. Lewis, 40 F.3d 1325, 1342-1343 (1st Cir. 1994) (holding that error was harmless).

[7] In United States v. Jones, supra, the court of appeals rejected the government's argument that the admission of evidence regarding the nature of the defendant's prior felony was harmless because the district court gave a limiting instruction to the jury. The court stressed that the admission of the defendant's prior drug crime seriously impaired the defendant's ability to present a casual user defense to a charged drug crime and that the government presented no eyewitness testimony inconsistent with the defendant's defense. 67 F.3d at 325. Here, by contrast, the government

(continued...)

This is not a case, moreover, in which the prosecution attempted to explore the details of the prior conviction. Rather, the United States introduced a certified copy of the defendant's judgment and commitment order which identified petitioner's prior felony as an assault. See Gov't C.A. Br. 4. The government's proffer was not inflammatory, nor was it introduced for a purpose other than to establish the existence of an earlier offense punishable by a term of more than one year.

Finally, the evidence against petitioner on each of the charged offenses was compelling. A witness saw petitioner fire the pistol. Gov't C.A. Br. 9. Police officers recovered the pistol from petitioner's truck and seized ammunition and a spent casing for the pistol from petitioner's pocket shortly after his arrest. Ibid. An agent subsequently discovered a bullet hole between the location at which petitioner was standing and the area in which the victim sought refuge. Id. at 8. In light of this evidence, and because the district court provided an adequate limiting instruction, any Rule 403 error was harmless and does not warrant this Court's review.

---

[7](...continued)
presented a strong case against petitioner, including eyewitness testimony that he fired the pistol. Gov't C.A. Br. 9. Given the strength of the government's case against petitioner, there is no basis to question the presumption that the jury obeyed the court's limiting instruction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

DECEMBER 1995

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

OLD CHIEF, JOHNNY LYNN
Petitioner

vs. No. 95-6556

USA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 29th day of December 1995.

ANTHONY GALLAGHER
SUITE 302, THE LIBERTY CENTER
9 THIRD STREET NORTH
GREAT FALLS, MT 59401

Drew S. Days, III/ES

DREW S. DAYS, III
Solicitor General

December 29, 1995

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

95-6556

ORIGINAL

SECOND MOTION TO PROCEED *IN FORMA PAUPERIS*

The Petitioner, JOHNNY LYNN OLD CHIEF, through counsel, requests that this Honorable Court allow him to proceed *in forma pauperis*. In support of his motion, Petitioner represents as follows:

Trial and Appellate counsel, Daniel Donovan and the Federal Defenders of Montana, Inc., representing Petitioner before this Honorable Court, were appointed pursuant to 18 U.S.C. section 3006A. Therefore, no notarized affidavit or declaration of indigency is required by Supreme Court Rule 39.

DATED this 27th day of October, 1995.

ANTHONY R. GALLAGHER
Chief Federal Defender for the
District of Montana
*DANIEL DONOVAN
Assistant Federal Defender
Federal Defenders of Montana
Suite 302, The Liberty Center
#9 Third Street North
Great Falls, Montana 59401
(406) 727-5328
*Counsel of Record

(2)

(4)

No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

ANTHONY R. GALLAGHER
Federal Defender for the
District of Montana

*DANIEL DONOVAN
Assistant Federal
Defender
Federal Defenders of
Montana
#9 Third Street North,
Suite 302
P. O. Box 3547
Great Falls, Montana
59403-3547
Telephone: (406) 727-5328
Counsel for Petitioner

*Counsel of Record

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, DC 20530
Telephone: (202) 514-2217
Counsel for Respondent

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHNNY LYNN OLD CHIEF, Defendant.	CR-94-03-GF-PGH Title 18 U.S.C. § 922(g) FELON IN POSSESSION (Penalty: 10 years imprisonment without parole and/or $250,000 fine) Title 18 U.S.C. § 924(c) USE OF A WEAPON IN A VIOLENT CRIME (Penalty: Mandatory 5 Years Imprisoned without Parole) Title 18 U.S.C. § 1153 & 113(e) ASSAULT WITH A DANGEROUS WEAPON (Penalty: 5 years imprisonment without parole and/or $1,000 fine)

INDICTMENT

(Filed Febr. 17 1994)

THE GRAND JURY CHARGES:

COUNT I

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, JOHNNY LYNN OLD CHIEF, having been

convicted of a felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States District Court in and for the District of Montana, on the 28th day of September, 1989, did knowingly possess, in and affecting interstate or foreign commerce, a firearm, that being a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. § 922(g).

COUNT II

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, JOHNNY LYNN OLD CHIEF, did knowingly use a weapon, that is, a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault within the Maritime and Territorial Jurisdiction of the United States, in violation of Title 18 U.S.C. § 924(c).

COUNT III

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, the defendant, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and willfully, and with the intent to do bodily harm, assault Anthony Calf Looking, with a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial

number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. §§ 1153 and 113(c).

A TRUE BILL.

/s/ JoAnn Duncan
FOREPERSON

/s/ Illegible
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHNNY LYNN OLD CHIEF, Defendant.	No. CR-94-03-GF-PGH

DEFENDANT'S MOTION IN LIMINE

(Excerpted from Defendant's Pretrial Motions)

Defendant OLD CHIEF moves this Court in limine to order the prosecution to refrain from mentioning – by reading the Indictment, during jury selection, in opening statement, or closing argument – and to refrain from offering into evidence or soliciting any testimony from any witness regarding the prior criminal convictions of the Defendant, *except* to state that the Defendant has been convicted of a crime punishable by imprisonment exceeding one (1) year.

It is specifically alleged in the Indictment (Count I) that Defendant OLD CHIEF has been convicted of one felony crime, to-wit: "having been convicted of a felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is,

Assault Resulting in Serious Bodily injury, in the United States District Court in and for the District of Montana on the 28th day of September, 1989. . . . " If the jury is informed as to the name of Defendant's prior conviction, i.e., Assault Resulting in Serious Bodily Injury, and any details thereof, it would have such a prejudicial effect on the jury that the jury would be unfairly influenced in deciding whether or not there is proof beyond a reasonable doubt, particularly as to Counts II and III.

Defendant OLD CHIEF is willing to solve the problem here by stipulating, agreeing and requesting the Court to instruct the jury that he has been convicted of crime punishable by imprisonment exceeding one (1) years. See Defendant's Proposed Jury Instruction No. 7 attached hereto as Exhibit "A". he thus would stipulate that the Government has proven one of the essential elements of the offense of Count I: Unlawful Possession of a Firearm and the Court would instruct the jury that this element is proven. There would be absolutely no need to tell the jury what the conviction was for.

Under FRE 403, a district court must weigh the probative value of evidence of a conviction against its prejudicial effect. *United States v. Ono*, 918 F.2d 1462, 1465 (9th Cir. 1990). As stated in *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982).

> " . . . the court must exclude any evidence having a prejudicial effect that substantially exceeds its probative value."

A conviction of a prior felony assault offense is certainly prejudicial where the Defendant is being accused of Assault With a Dangerous Weapon (Count III) and

Using or Carrying a Firearm During the Commission of a Crime of Violence (Count II). Thus, this Court must consider Rule 403's requirement to weigh the probative value, if any, against the prejudicial effect. *Ono*, at p. 1465.

The fact that there was an assault conviction, is not probative. All that § 922(g)(1) requires is a *felony* conviction. The Defense is willing to stipulate that Defendant OLD CHIEF has a felony conviction and that the jury be so instructed.

An offer to stipulate is relevant under FRE 403. *See, United States v. Davis*, 792 F.2d 1299, 1[illegible] (5th Cir. 1986). The Fifth Circuit, in *United States v. Spletzer*, 535 F.2d 950, 955-956 (5th Cir. 1976), held that it was error to admit a certified copy of the defendant's prior conviction into evidence as being prejudicial where the defense agreed to stipulate to the conviction and there was no prosecutorial need for such evidence. *Accord: United States v. Yeagin*, 927 F.2d 798, 801-803 (5th Cir. 1991) ("We believe that the prosecutor's need to introduce evidence of [the defendant's] nine prior convictions was negligible in comparison to the extremely prejudicial effect that this evidence must have had on the jury.").

The Seventh Circuit has stated that indictments and evidence should not make the jury aware of any prior convictions beyond those necessary as an element of the offense. *United States v. King*, 897 F.2d 911, 913 (7th Cir. 1990). The reasoning is clear:

> "The danger inherent in submitting evidence of a defendant's prior convictions to a jury needs little explanation. . . . [A] jury may be willing to convict a defendant based on the inference that he or she was acting in conformity with past misconduct rather than upon the government's proof beyond a reasonable doubt." *United States v. Lowe*, 860 F.2d 1370, 1381-1382 (7th Cir. 1988)

The Ninth Circuit had held that if a defendant had stipulated to being a convicted felon, proof of his prior convictions may have been prejudicial error. *United States v. Lloyd*, 981 F.2d 1071, 1072 (9th Cir. 1992). Proof here of Defendant OLD CHIEF's prior assault conviction is unnecessary and certainly prejudicial. See *United States v. Dunn*, 946 F.2d 615, 619-20 (9th Cir. 1991).

There is presently a conflict in the Ninth Circuit on this stipulation issue. In *United States v. Barker*, 1 F.3d 957, 959 fn.3 (9th Cir. 1993), the Court stated that "[t]he underlying facts of the prior conviction are completely irrelevant under § 922(g)(1); the existence of the conviction itself is not." *See*, also, *Lloyd*, 981 at p. 1072. In *United States v. Breitkreutz*, 8 F.3d 688, 690-692 (9th Cir. 1993), the court held that admission of proof of three prior felony convictions, when only one conviction was required to support a conviction under § 922(g)(1), was reversible error because the jury might have been influenced by its knowledge of the defendant's criminal history. However, the *Breitkreutz* court stated that the defendant's offer to stipulate to prior offense does not preclude the Government from proving the prior offense as an element of § 922(g)(1). Unlike *Breitkreutz*, the case at bar includes two other charges in addition to the § 922(g)(1) charge. Furthermore, Defendant OLD CHIEF is willing to agree that the Court instruct the jury that the first element of Count I is proven.

The element required to be proven for Unlawful Possession of a Firearm (Count I) is that Defendant OLD CHIEF had been convicted of a felony. There is no need to tell the jury that the particular felony was Criminal Possession of Dangerous Drugs [sic – Assault Resulting in Serious Bodily Injury] or to explain any of the circumstances of this offense. If the Court were to allow the Government to mention or present evidence of these convictions, the jury may convict based on Defendant's past misconduct rather than on proof beyond a reasonable doubt of the present charges.

In the United States District Court
for the District of Montana,
Great Falls Division

(Caption Omitted in Printing)

INSTRUCTION NO. ___

The phrase "crime punishable by imprisonment for a term exceeding one year" generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable by a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.

In [sic] hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year.

Defendant's Proposed Instruction No. 7

SOURCE: Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* (4th Ed.) § 36.10

"Crime Punishable by imprisonment for a Term Exceeding One Year" – Defined

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CR 94-3-GF-PGH
JOHNNY LYNN OLD CHIEF, Defendant.	)	

GOVERNMENT'S RESPONSE TO MOTION IN LIMINE

(Excerpted from Government's Response to Pretrial Motions)

* * *

The defendant seeks to prohibit the United States from proving that the defendant has been convicted of a felony, or more specifically, to prohibit the United States from discussing the nature of the felony, by stipulating to the existence of that element and seeking to prohibit any discussion regarding the prior conviction. While the United States tends to agree with the defendant that the gratuitous "piling on" of prior convictions would be prejudicial; *United States v. Lipps*, 659 F.2d 960 (9th Cir. 1981), *United States v. Breitkreutz*, 8 F.3d 688, 692 (9th Cir. 1993), it does not believe that proving one prior conviction, a necessary element of the offense, is inherently more prejudicial than probative. As the Court is aware, the Circuits have been reluctant to rule that the United States is compelled to accept a stipulation when offered. *United*

States v. Barker, 1 F.3d 957, 959-60 (9th Cir. 1993); *United States v. Lloyd*, 981 F.3d 1071, 1072 (9th Cir. 1992); *United States v. Campbell*, 774 F.2d 354, 356 (9th Cir. 1985). See also, *United States v. Gillian*, 994 F.2d 97, 100-02 (2nd Cir. 1993). The United States does not accept the offer to stipulate and opposes the defendant's request to prohibit any discussion as to the existence and nature of the prior conviction. As this Court has often said, all probative evidence is inherently prejudicial. The law requires proof of the existence of a felony and the United States is prepared to make that showing.

* * *

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)
(Excerpted from Transcript of Hearing on Motion in Limine)

* * *

[4] and I will give him his curriculum vitae. And the conclusion was the fingerprint did not belong to the defendant. However, we will be calling the expert to explain to the jury why a person who handles a gun might not leave the fingerprints – be fairly short testimony.

MR. DONOVAN: Okay.

Secondly, Your Honor, I have a motion in limine. And I am asking the court to order that the prosecution not refer to – specifically to Mr. Old Chief's prior felony conviction, which is alleged in Count I as assault which resulted in serious bodily injury.

As you know, Your Honor, Mr. Old Chief is charged in Count I as a felon in possession of a firearm; Count II, with use of a weapon in a violent crime; and Count III, of assault with a dangerous weapon. And I contend just the mere mention of what this prior offense, assault resulting in serious bodily injury, is highly prejudicial and not necessarily probative.

And the fact, Your Honor, I am willing not only to stipulate, but I have a proposed jury instruction which I'd like to submit for this hearing – it's labeled as Defendant's Exhibit A – whereby I am willing and agreeable to having the Court instruct the jury that Mr. Old Chief has

in fact been convicted of a felony crime, of a crime punishable by imprisonment exceeding one year. [5] And I believe there is no reason whatsoever, no necessity for the Government to introduce any evidence regarding the assault resulting in serious bodily injury or the name of it itself with the fact we are willing to agree to have the jury instructed Mr. Old Chief has been convicted of a felony.

THE COURT: Well, that would seem to cover Count I, I guess.

Rostad, what about Count II? Does that –

MR. ROSTAD: Count II does not require proof of a felony, Your Honor.

MR. DONOVAN: The other counts do not require that as an element, Your Honor. This second count goes to the one we are talking about here on October 20, '93.

MR. ROSTAD: It's all the same date, all the same activity, Your Honor.

THE COURT: What do you say then as to his Count I?

MR. ROSTAD: Your Honor, we would not like to stipulate. We intend to prove the conviction through extrinsic proof as we are obliged, as well as may do.

I think in our brief we have indicated that, yes, it's true if you pile them on – we talk about Mr. Old Chief's prior robbery as well as any other convictions he's had that may be inherently prejudicial, but the Ninth Circuit and most other Circuits say we have a right [6] to be able to prove our case. And if that involves the proof of

conviction, that is what it will be. And we request the Court to have the ability to do that.

THE COURT: All right. I overruled your motion on that point. If he doesn't want to stipulate, he doesn't have to.

MR. DONOVAN: All right.

Your Honor, we resolved the motion to suppress statement, so I have one other motion.

I filed a motion to compel fingerprint information of the information I have from the reports, and that is that a fingerprint was found on the weapon involved in this case, and that the FBI compared that print to the known prints belonging to my client, Johnny Old Chief to another individual named Jess Crawford and to another girl involved in the offense or at the scene named Stephanie Spotted Eagle, and there was no – the prints didn't match.

And I would ask the Court to order the United States to have known prints of other individuals who were at the scene of this offense, and those I have listed in the motion, Your Honor, to compare their known prints to this unknown print on the weapon, to see whether or not there's a match.

And I believe that I have no other way to do this

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. CR-94-003-GF**
vs.	)	**ORDER**
JOHNNY LYNN OLD CHIEF,	)	
Defendant.	)	

Presently before the court are a number of pretrial motions filed on behalf of defendant Johnny Lynn Old Chief. Having reviewed the record herein, together with the parties' briefs in support of their respective positions, the court holds as follows:

(1) defendant's motion for discovery is hereby DENIED;

(2) defendant's motion *in limine* is hereby DENIED;

(3) defendant's motion to supress [sic] is hereby DENIED; and

(4) defendant's motion to compel scientific examination is hereby DENIED.

DATED this 3rd day of June, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Government's Exhibit No. 1 – Certified Copy of Prior Assault Conviction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. CR-89-025-GF**
	)	
vs.	)	**JUDGMENT**
	)	**AND**
JOHNNY LYNN OLD CHIEF,	)	**COMMITMENT**
Defendant.	)	

On the 26th day of September, 1989, came Carl E. Rostad, Assistant United States Attorney for the District of Montana, and the defendant, JOHNNY LYNN OLD CHIEF, appearing in his proper person and represented by his counsel, John Keith, Attorney at Law, 606 Strain Building, Great Falls, Montana 59401 (406) 727-8686.

And the defendant having been convicted on his plea of guilty of the offense charged in Count II of the indictment in the above-entitled cause, to-wit: That on or about the 18th day of December 1988, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian country, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury, in violation of Title 18 U.S.C. §§ 1153 and 113(f).

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary appearing or being shown to the court,

Pursuant to the Sentencing Reform Act of 1984, IT IS THE JUDGMENT OF THE COURT that the defendant, JOHNNY LYNN OLD CHIEF, is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of SIXTY (60) MONTHS.

Upon release from imprisonment, the defendant is hereby placed on supervised release for a term of TWO (2) YEARS.

While on supervised release, the defendant shall not commit another Federal, state, local or tribal crime; and shall comply with the standard conditions that have been adopted by this court.

DATED this 28th day of September, 1989.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)
(Excerpted from Trial Transcript)

* * *

[74] THE TRIAL THERE SHOULD BE ANY NEWSPAPER PUBLICITY AND ALL THAT, DON'T READ IT. JUST KEEP IT UNTIL YOU'RE RELEASED, AND READ IT AFTERWARDS AND SEE IF YOU SAW THE SAME TRIAL THEY DID.

AND THEN, ALSO, IN THE – THIS IS A BEAUTIFUL OLD ROOM, BUT IT'S NOT – KIND OF – WE ARE ALL KIND OF MIXED TOGETHER, SO BE PLEASANT AND SAY GOOD MORNING AND THAT, BUT DON'T LET IT APPEAR THAT THERE'S ANY IMPROPRIETY, YOUR TALKING TO ANY OF THE ATTORNEYS OR WITNESSES OR ANYTHING LIKE THAT DURING THE TRIAL.

OKAY. WE WILL BREAK UNTIL 1:15.

MR. ROSTAD: THANK YOU, JUDGE.

(NOON RECESS.)

(FOLLOWING PROCEEDINGS HELD IN OPEN COURT WITH ALL COUNSEL AND THE DEFENDANT PRESENT, WITH THE JURY.)

THE COURT: THE RECORD WILL SHOW WE'RE NOT ALL PRESENT, BUT THE JURY IS PRESENT. ALL RIGHT, THE RECORD WILL SHOW WE'RE ALL NOW PRESENT.

MR. ROSTAD, YOUR NEXT WITNESS, PLEASE.

MR. ROSTAD: YOUR HONOR, BEFORE I CALL OUR NEXT WITNESS, I WOULD MOVE FOR ADMISSION OF GOVERNMENT'S EXHIBITS 1 AND 5. FIVE IS NOT ON OUR EXHIBIT LIST. FIVE IS CERTIFICATION THAT THE DEFENDANT IS AN INDIAN PERSON, FROM THE BLACKFEET TRIBE. EXHIBIT NO. 1 IS HIS PRIOR CONVICTION, JUDGMENT AND COMMITMENT, WHICH IS A CERTIFIED [75] RECORD. I MOVE FOR BOTH OF THOSE UNDER RULE 902.

THE COURT: IS THERE OBJECTION?

MR. DONOVAN: I OBJECT TO ONE, YOUR HONOR, BASED ON THE MOTION IN LIMINE I FILED PRIOR TO TRIAL.

THE COURT: DENIED. BE RECEIVED. AND ALSO, FIVE IS RECEIVED.

MR. ROSTAD: WITH THAT, YOUR HONOR, WE'D CALL STACEY EVERYBODY TALKS ABOUT.

STACEY EVERYBODY TALKS ABOUT, GOVERNMENT WITNESS, SWORN.

THE CLERK: PLEASE BE SEATED RIGHT UP THERE. PLEASE STATE YOUR FULL NAME AND SPELL YOUR LAST NAME.

THE WITNESS: STACEY RAY EVERYBODY TALKS ABOUT, E-V-E-R-Y-B-O-D-Y, T-A-L-K-S, A-B-O-U-T.

DIRECT EXAMINATION

BY MR. ROSTAD:

Q STACEY, WHERE ARE YOU FROM?

A MONTANA, OR BROWNING.

Q BROWNING.

YOU'RE A LITTLE NERVOUS. WOULD YOU LIKE A GLASS OF WATER OR SOMETHING WHILE YOU TESTIFY?

OKAY. STACEY, YOU'RE FROM BROWNING?

HOW LONG HAVE YOU LIVED IN BROWNING?

A ALL MY LIFE.

Q STACEY, DO YOU KNOW STEPHANIE SPOTTED EAGLE?

* * *

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)

District Court's Jury Instructions

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the court as to the law that applies in this case.

It is your duty as jurors to follow the law as stated in these instructions, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given you in these instructions, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in this case.

Justice through trial by jury must always depend upon the willingness of each individual juror to find the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

In these instructions I shall first state some general rules or principles of law which apply to all criminal cases, and then instruct you more specifically on the law that applies to this particular case.

You have been chosen and sworn as jurors to try the issues of fact presented by the allegations of the Indictment and the denial made by the "Not Guilty" pleas of the accused. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the accused and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court and reach a just verdict, regardless of the consequences.

The law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate" – with no evidence against him. And the law permits nothing but legal evidence presented before the Jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt from all the evidence in the case.

A reasonable doubt is a fair doubt, based upon reason and common sense. This does not mean, however, that you must be convinced of a defendant's guilt to an absolute or mathematical certainty, for there are few things in life of which we can be absolutely certain. What it means, rather, is that you must be persuaded of the defendant's guilt as you would want to be persuaded

about the most important concerns in your life. A reasonable doubt, in other words, does not mean a mere possibility that the defendant may be innocent, nor does it mean a fanciful or imaginary doubt or a doubt based upon groundless conjecture. In short, a reasonable doubt does not mean a doubt for the sake of doubting. What it means, rather, is an actual and substantial doubt having some reason for its basis. However, a defendant is never to be convicted on mere suspicion or conjecture.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. Since the burden is always upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence in the case, the jurors do not feel convinced to a moral certainty that a defendant is guilty of the charge.

There is nothing really different in the way a Jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question arising in the most important of their affairs and depending upon evidence presented to them. In other words, you should use, in attempting to determine where the truth lies in this case, your good sense. You should attempt to determine the actual truth here by exercising your best

judgment based upon the knowledge which you have of the characteristics of your fellow man.

If the accused be proved guilty beyond a reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in the case.

So, if the Jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the Jury views the evidence in the case as reasonably permitting either of two conclusions – one of innocence, the other of guilt – the Jury should, of course, adopt the conclusion of innocence.

Remember also that the question before you can never be: will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty.

An Indictment is but a formal method of accusing a defendant of a crime. It is not evidence of any kind against the accused, and does not create any presumption or permit any inference of guilt.

There are two types of evidence from which a Jury may properly find a defendant guilty of a crime. One is direct evidence – such as the testimony of an eyewitness. The other is circumstantial evidence – the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply

requires that, before convicting a defendant, the Jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

In every crime, there must exist a union or joint operation of act, or failure to act, and intent.

The burden is always upon the Government to prove both act, or failure to act, and intent beyond a reasonable doubt.

To establish intent, the Government must prove that the defendant knowingly did an act which the law forbids.

An act is done knowingly if the defendant realized what he was doing and did not act through ignorance, mistake or accident. You may consider the evidence of the defendant's acts and words, along with all the other evidence, in deciding whether the defendant acted knowingly.

Intent may be proved by circumstantial evidence. Indeed, it can rarely be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, of course there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does, or fails to do, may indicate intent, or lack of intent, to commit the offense charged.

In determining the issue of intent, the Jury is entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence in the case which may aid determination of state of mind.

Statements and arguments of counsel are not evidence in the case, unless made as an admission. When the attorneys on both sides agree as to the existence of a fact, the Jury must accept that fact as conclusively proved.

Unless you are otherwise instructed, the evidence always consists of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received in evidence, regardless of who may have produced them; all facts which may have been admitted; all facts and events which may have been judicially noticed; and all applicable presumptions hereinafter stated in these instructions.

It is the duty of the attorney on each side of a case to object when the other side offers testimony or other evidence which the attorney believes is not properly admissible.

Upon allowing testimony or other evidence to be introduced over the objections of an attorney, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence.

When the court has sustained an objection to a question, addressed to a witness, the Jury must disregard the question entirely, and may draw no inference from the wording of it, or speculate as to what the witness would have said if permitted to answer any question.

Anything you may have seen or heard outside the courtroom touching the merits of the case is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited

to the bold statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Presumptions are deductions or conclusions which the law requires the Jury to make under certain circumstances, in the absence of evidence in the case which leads the Jury to a different or contrary conclusion. A presumption continues to exist only so long as it is not overcome or outweighed by evidence in the case to the contrary; but unless and until the presumption is so outweighed, the Jury are bound to find in accordance with the presumption.

Therefore, unless and until outweighed by evidence in the case to the contrary, the law presumes that a person is innocent of crime or wrong and that the law has been obeyed.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and

demeanor and manner while on the witness stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the Jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other times the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony, or by evidence that the witness has been convicted of a felony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

The testimony of a single witness which produces in your minds belief in the likelihood of truth beyond a reasonable doubt is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and honesty of the one witness.

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the fact a defendant chooses not to testify.

You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's knowledge and intent and for no other purpose.

You have also heard evidence that the defendant has previously been convicted of a felony. You may consider that evidence only as it may affect the defendant's believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial.

You are instructed to bear in mind that an Indictment is not evidence. A defendant in a criminal case is presumed to be innocent and does not have to testify or present any evidence to prove innocence. The Government has the burden of proving every element of a charge beyond a reasonable doubt. If it fails to do so, the jury must return a not guilty verdict on that charge.

The Indictment in this case contains three separate counts. Each count charges a separate crime against the defendant. The charges have been joined for trial. You must consider each count separately, that is, you must decide separately what the evidence in the case shows about each count. Your verdict on one count should not control your verdict as to any other count.

I shall now instruct you on the essential elements of the offenses charged against the defendant which the Government must prove beyond a reasonable doubt in order to make its case.

I remind you that only this defendant, JOHNNY LYNN OLD CHIEF, is on trial here, not anyone else, and only for the offenses charged, not for anything else. You should consider evidence about the acts, statements, and intentions of others, or evidence about other acts of the defendant, only as they relate to the charges against this defendant.

Focusing specifically on the Indictment, COUNT I charges:

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, having been convicted of a

felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States District Court in and for the District of Montana, on the 28th day of September, 1989, did knowingly possess, in and affecting interstate or foreign commerce, a firearm, that being a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. § 922(g).

With respect to the offense charged in Count I of the Indictment, you are instructed that sections 922(g) of Title 18 of the United States Code, provides, in pertinent part:

> It shall be unlawful for any person –
>
> . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . knowingly . . . possess in or affecting commerce, any firearm . . . which has been shipped or transported in interstate or foreign commerce.

In order for the defendant to be found guilty of the offense of unlawful possession of a firearm, as charged in Count I of the Indictment, the Government must prove, beyond a reasonable doubt, the following three essential elements:

FIRST: That the defendant, JOHNNY LYNN OLD CHIEF, was convicted of an offense punishable by imprisonment for more than one year;

SECOND: That the defendant, JOHNNY LYNN OLD CHIEF, knowingly possessed a .9mm Jennings Bryco Model 59, serial number 604228; and

THIRD: That such possession was in or affecting interstate commerce.

I remind you again that the burden is upon the Government to prove, beyond a reasonable doubt, each and every one of these essential elements I have set forth. The law never imposes upon the defendant in a criminal case the burden of introducing any evidence or calling any witnesses.

With respect to the first element set forth above, I instruct you that the offense of Assault Resulting in Serious Bodily Injury is a crime in the federal courts of the United States punishable by imprisonment for more than one year.

The second element of this charge holds the Government to proving, beyond a reasonable doubt, that the defendant, JOHNNY LYNN OLD CHIEF, knowingly possessed a firearm. You are instructed that the term "firearm" means any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

You are further instructed that the term "possess" means to exercise authority, dominion or control over. This does not necessarily mean that one must hold it physically, that is, have actual possession of it. If you find that the defendant either had actual possession or had the power and intention to control the firearm, even though it may have been in the physical possession of another, you may find that the Government has proved possession. The law recognizes that possession may be sole or joint. If the defendant alone possesses a firearm, that is

sole possession. If the defendant jointly with others possesses a firearm, that is joint possession.

The government is not required to show the defendant owned a firearm. Lack of ownership is not a defense to the offense charged.

Mere presence on the scene, plus association with illegal possessors, is not enough to support a conviction for unlawful possession of a firearm. Presence alone cannot show the requisite knowledge, power, or intention to exercise control over the firearm.

Mere Proximity to as [sic] firearm is insufficient, standing alone, to sustain a conviction for unlawful possession of a firearm.

You are further instructed that an act is done "knowingly" if it is done purposely and voluntarily, as opposed to mistakenly or accidentally.

The third element of this charge holds the Government to proving, beyond a reasonable doubt, that the defendant's possession of a firearm was in or affecting interstate commerce. I instruct you that the Government may meet its burden with respect to this element by proving, beyond a reasonable doubt, that the firearm identified in the indictment had, at any time, travelled across a state boundary line. The government does not have to prove that this defendant personally transported the firearm from one state to another. It is sufficient if the government proves that the firearm moved from one state to another prior to the time it was possessed by the defendant.

Count II of the Indictment in this case charges:

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, did knowingly use a weapon, that is, a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault within the Maritime and Territorial Jurisdiction of the United States, in violation of Title 18 U.S.C. § 924(c).

With respect to the offense charged in Count II of the Indictment, you are instructed that section 924(c) of Title 18 of the United States Code, provides, in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall be guilty of an offense against the laws of the United States.

In order for the defendant, JOHNNY LYNN OLD CHIEF, to be found guilty of the offense of using or carrying a firearm during the commission of a crime of violence, as charged in Count II of the indictment, the Government must prove the following two essential elements beyond a reasonable doubt:

FIRST: That the defendant, JOHNNY LYNN OLD CHIEF, committed a crime of violence as charged in Count III of the indictment; and

SECOND: That during and in relation to the commission of that crime of violence, the defendant, JOHNNY LYNN OLD CHIEF, knowingly used or carried

a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol.

I remind you that the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

With specific reference to Count II of the indictment, I further instruct you to bear in mind the following:

(1) The crime of Assault within the Maritime and Territorial Jurisdiction of the United States is a crime of violence as that term is used in these instructions;

(2) The term "in relation to" requires there be some relation or connection between the underlying criminal act and the use or possession of the firearm.

(3) The phrase "uses or carries a firearm" means having a firearm, or firearms, available to assist or aid in the commission of the crime alleged in Count III of the indictment.

In determining whether the defendant used or carried a firearm, you may consider all of the factors received in evidence in the case including the nature of the crime of violence, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime alleged, and the circumstances surrounding the presence of the firearm.

The government is not required to show that the firearm was loaded or that the defendant actually displayed or fired the firearm. The government is required,

however, to prove beyond a reasonable doubt that the firearm was in the defendant's possession or under the defendant's control at the time that a crime of violence was committed. Lack of ownership is not a defense to the offense charged.

I remind you of the definition of "knowingly" previously given in these instructions.

Count III of the Indictment in this case charges:

That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, the defendant, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and willfully, and with the intent to do bodily harm, assault Anthony Calf Looking, with a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. §§ 1153 and 113(c).

With respect to the offense charged in Count III of the Indictment, you are instructed that section 1153 of Title 18 of the United States Code, provides, in pertinent part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . assault with a dangerous weapon, . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

Section 113(c) of Title 18 of the United States Code provides, in pertinent part:

> Whoever, within the special maritime and territorial jurisdiction of the United States,
>
> . . .
>
> [commits] assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, shall be guilty of an offense against the laws of the United States.

In order for the defendant, JOHNNY LYNN OLD CHIEF, to be found guilty of the offense of assault with a dangerous weapon, as charged in Count III of the indictment, the Government must prove the following three essential elements beyond a reasonable doubt:

FIRST: That the defendant, JOHNNY LYNN OLD CHIEF, is an Indian person;

SECOND: That the incident occurred on or within the boundaries of the Blackfeet Indian Reservation, being Indian country;

THIRD: That the defendant, JOHNNY LYNN OLD CHIEF, intentionally used a display of force that reasonably caused Anthony Calf Looking to fear immediate bodily harm;

FOURTH: That the defendant, JOHNNY LYNN OLD CHIEF, acted with the specific intent to do bodily harm to Anthony Calf Looking; and

FIFTH: That the defendant used a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol.

I remind you that the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

With specific reference to Count III of the indictment, I further instruct you to bear in mind the following:

(1) A semi-automatic pistol is a dangerous weapon if it is used in a way that is capable of causing death or serious bodily injury.

(2) I remind you of the definition of "knowingly" previously given in these instructions.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

I shall provide you with a verdict form for your deliberations. You must complete the form by providing your unanimous answer to each of the questions presented.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to

the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to the guilt or innocence of the accused.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A form of verdict has been prepared for your convenience. You will take this form to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form to state the verdict upon which you unanimously agree, and then return with your verdict to the courtroom.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your foreperson, or by one or more members of the Jury. No member of the Jury should ever attempt to communicate with the court by any means other than a signed writing; and the court will never communicate with any member of the Jury on any subject

touching the merits of the case, otherwise than in writing, or orally here in open court.

You will note from the oath about to be taken by the bailiffs that they, too, as well as all other persons, are forbidden to communicate in any way or manner with any member of the Jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person – NOT EVEN TO THE COURT – how the Jury stands, numerically or otherwise, on the question of the guilt or innocence of the accused, until after you have reached a unanimous verdict.

It is proper to add the caution that nothing said in these instructions – nothing in any form of verdict prepared for your convenience – is to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the Jury.

UNITED STATES DISTRICT COURT,
DISTRICT OF MONTANA
GREAT FALLS DIVISION

(Caption Omitted In Printing)
(Excerpted from Trial Transcript)

[334] * * *

MR. DONOVAN: RIGHT.

THE COURT: WELL, IT'S DONE. I'M SURE THEY NOTED THAT.

ANYTHING ELSE?

MR. DONOVAN: THERE'S A COUPLE MORE. PAGE 13, JUST RENEWING THE MOTION IN LIMINE, YOUR HONOR. I HAD PROPOSED DEFENSE INSTRUCTION NO. 7, AND BASICALLY AGREED TO STIPULATE AND ADMIT THAT, THE PRIOR FELONY CONVICTION, AND OF COURSE, IT'S AGAIN BROUGHT UP HERE ON PAGE 13. AND WHAT IT IS, IT'S ALL RESULTING IN SERIOUS BODILY INJURY, SO I'M JUST CONTINUING THE RECORD ON THAT.

THE COURT: VERY WELL.

MR. DONOVAN: AND THEN ON PAGE 16, THE TWO ELEMENTS FOR COUNT II, I WOULD CALL YOUR ATTENTION, YOUR HONOR, TO DEFENDANT'S PROPOSED 15, AND I BELIEVE THERE SHOULD BE A THIRD ELEMENT WHICH I HAD PROPOSED WHICH SAYS THAT THE DEFENDANT JOHNNY LYNN OLD CHIEF'S USE AND CARRYING OF SAID FIREARM MUST HAVE BEEN DURING AND IN RELATION TO THE CRIME.

THE COURT: NO, THAT'S INCLUDED IN THERE. I DON'T HAVE ANY PROBLEM WITH THAT. OKAY.

MR. DONOVAN: I THINK I ONLY HAVE ONE MORE ON PAGE 19. PAGE 19, DEALING WITH THE ELEMENTS FOR COUNT III, I BELIEVE THAT - I BELIEVE THAT ASSAULT WITH A DANGEROUS WEAPON IS A SPECIFIC INTENT CRIME, SO I HAD

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOHNNY LYNN OLD CHIEF, Defendant.	)	NO. CR-94-003-GF JUDGMENT AND COMMITMENT

On the 26th day of July, 1994, came Carl E. Rostad, Assistant United States Attorney for the District of Montana, and the defendant, **JOHNNY LYNN OLD CHIEF,** appearing in his proper person and represented by his counsel, Daniel Donovan, Federal Public Defender. #9 Third Street North, Suite 302, Great Falls, MT 59401 (406) 727-5328.

And the defendant having been convicted on his plea of not guilty, and a verdict of guilty by a jury, of the offenses charged in Counts I, II and III of the Indictment in the above-entitled cause, to-wit: **COUNT I**: That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, having been convicted of a felony crime punishable under the laws of the United States for a term of imprisonment of more than one year, that is, Assault Resulting in Serious Bodily Injury, in the United States

District Court in and for the District of Montana, on the 28th day of September, 1989, did knowingly possess, in and affecting interstate or foreign commerce, a firearm, that being a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. § 922(g); **COUNT II**: That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, the defendant, Johnny Lynn Old Chief, did knowingly use a weapon, that is, a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, during and in relation to a crime of violence for which he may be prosecuted in a court of the United States, that is, Assault within the Maritime and Territorial Jurisdiction of the United States, in violation of Title 18 U.S.C. § 924(c); and **COUNT III**: That on or about the 23rd day of October, 1993, at Browning, in the State and District of Montana, and on and within the exterior boundaries of the Blackfeet Indian Reservation, being Indian Country, the defendant, JOHNNY LYNN OLD CHIEF, an Indian person, did knowingly and willfully, and with the intent to do bodily harm, assault Anthony Calf Looking, with a dangerous weapon, that is a 9mm Jennings Bryco Model 59, serial number 604228, semi-automatic pistol, in violation of Title 18 U.S.C. §§ 1153 and 113(c).

And the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary appearing or being shown to the court,

Pursuant to the Sentencing Reform Act of 1984, IT IS THE JUDGMENT OF THE COURT that the defendant, **JOHNNY LYNN OLD CHIEF,** is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a

term of ONE HUNDRED TWENTY (120) MONTHS on Count I; and a term of SIXTY (60) MONTHS ON Count III; the term on Count III to run concurrently with the term on Count I. As to Count II, the statute requires a five-year mandatory enhancement, in addition to the above sentence, to be served consecutively to the terms imposed for Counts I and III. The terms of imprisonment imposed by this judgment shall run concurrently with the defendant's term of imprisonment imposed by this court in No. CR-89-025-GF, Violation of Supervised Release, District of Montana.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS. This term consists of terms of three (3) years on each of Counts I and III, all such terms to run concurrently. Within 72 hours of release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant shall not commit another Federal, state or local crime, pursuant to § 5B1.3(a) of the Guidelines; shall comply with the standard conditions that have been adopted by this court, and shall comply with the following additional conditions:

(1) that he shall be prohibited from possessing a firearm or other dangerous weapon;

(2) that he shall participate in a program of testing and treatment for drug and alcohol abuse, as directed by the United States Probation Officer, until such time as the defendant is released from the program by the probation officer;

(3) that he shall submit his person, office, vehicle, and place of residence to a search, conducted by a United States Probation Officer, at a reasonable time and in a reasonable manner, based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation; and

(4) that he pay a special assessment to the United States in the amount of ONE HUNDRED FIFTY AND NO/100 DOLLARS ($150.00), to be deposited into a special Crime Victims Fund, pursuant to 18 U.S.C. § 3013; payable immediately.

DATED this 29 day of July, 1994.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY LYNN OLD CHIEF, Defendant-Appellant.	No. 94-30277 D.C. No. CR-94-03-GF-PGH **MEMORANDUM***

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted April 14, 1995
Seattle, Washington

Before: **WRIGHT, POOLE** and **WIGGINS**, Circuit Judges.

Johnny Lynn Old Chief ("Old Chief") appeals his criminal convictions rendered by jury verdict in the federal district of Montana. Old Chief was convicted of being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon. The offenses charged took place on an Indian reservation, thus violating 18 U.S.C. § 1153.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Old Chief appeals on five grounds: (1) that the district court erred by allowing the prosecution to introduce extrinsic evidence of his prior felony conviction despite his offer to stipulate to his felon status; (2) that the district court erred by not ordering the prosecution to conduct fingerprint comparisons of all witnesses and individuals present at the scene of the offenses; (3) that his convictions on the assault charge and use enhancement were not supported by substantial evidence; (4) that the district court erred by not conducting a post-verdict evidentiary hearing regarding jury misconduct; and (5) that the district court improperly imposed a 57-month upward departure on his unlawful possession sentence in violation of the federal sentencing guidelines. For the reasons set forth below, we affirm Old Chief's convictions; however, we reverse his sentence and remand for resentencing.

I. INTRODUCTION OF OLD CHIEF'S PRIOR FELONY CONVICTION.

We review the district court's decision to admit or exclude evidence for an abuse of discretion. *United States v. Mullins*, 992 F.2d 1472, 1476 (9th Cir. 1993). Prior to trial, Old Chief made an offer to stipulate to his status as a convicted felon. He argued that introduction of his prior felony assault conviction to prove the element of the unlawful possession charge would be unduly prejudicial. The prosecution refused to stipulate, and the district court denied Old Chief's motion.

Regardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense

through introduction of probative evidence. *See United States v. Breitkreutz*, 8 F.3d 688, 690 (9th Cir. 1993) (citing *United States v. Gilman*, 684 F.2d 616, 622 (9th Cir. 1982)). Under Ninth Circuit law, a stipulation is not proof, and, thus, it has no place in the FRE 403 BALANCING PROCESS. *Breitkreutz*, 8 F.3d at 691-92.

Old Chief argues that our decision here is controlled by that in *United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994) *cert. denied*, 115 S.Ct. 1147 (1995). But *Hernandez* stands for the proposition that a defendant's stipulation to a prior felony is sufficient evidence to fulfill the requisite element of § 922(g)(1). It cannot be read for the quite different proposition that a defendant's stipulation to a prior felony must always be accepted to prove the requisite element of § 922(g)(1).

Thus, we hold that the district court did not abuse its discretion by allowing the prosecution to introduce evidence of Old Chief's prior conviction to prove that element of the unlawful possession charge.

II. REFUSAL TO COMPEL THE PROSECUTION TO CONDUCT FINGERPRINT COMPARISONS.

A district court's decision as to alleged *Brady* violations is reviewed *de novo*. *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993). The law of the Ninth Circuit is unequivocal on this point: "[t]he prosecution is under no obligation to turn over materials not under its control." *See United States v. Dominquez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (quoting *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991)).

Here, the one latent fingerprint "of value" was recovered from the bullet clip of the weapon used in the assault. Old Chief argues that, once it was determined that the latent fingerprint on the bullet clip did not match his known prints, the district court should have compelled the prosecution to conduct fingerprint comparisons of all the witnesses at the scenes of the offenses. Specifically, he contends that if the comparison resulted in a match between the latent print and the prosecution's key witness, that witness's crucial testimony would have been substantially impeached. Old Chief, however, did have access to the results of the fingerprint analysis that was conducted by the prosecution.

Consistent with its *Brady* obligations, the prosecutor turned over the potentially exculpatory results of the fingerprint analysis conducted for Old Chief and his two defense witnesses that claimed to have had contact with the gun on the day of the assault. Old Chief argued this lack of fingerprint evidence in his defense.

What Old Chief argues now, in sum, is that the prosecution's failure to obtain its own witness's fingerprints for comparison precluded and impaired his ability to present his defense. Old Chief's request, however, was tantamount to forcing the prosecution to secure evidence, not already in its possession, for use in the impeachment of its own witness. This is not required under *Brady* or *Dominquez-Villa*.

III. SUFFICIENCY OF EVIDENCE ON THE ASSAULT CHARGE AND USE ENHANCEMENT.

In determining whether the evidence was sufficient to support a conviction, we must determine whether, viewing all the evidence in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt of each essential element of the crimes charged. *Jackson v. Virgina*, 443 U.S. 307, 320 (1979); *United States v. Lennick*, 18 F.3d 814, 819 (9th Cir. 1994).

Old Chief argues that there was insufficient evidence to convict him on the assault charge and, therefore, the use enhancement. Specifically, he argues that, assuming he did fire the shot at the victim, Anthony Calf Looking, there was no evidence that he acted with specific intent to do bodily harm, nor that the gunshot caused Calf Looking to fear immediate bodily harm.

The only uncontroverted occurrence regarding the assault is that the victim, Calf Looking, provoked the fight with Old Chief. Only one witness testified at trial that she actually saw Old Chief point the gun directly at Calf Looking and fire in his direction.

Once on the stand, Calf Looking apparently began to retreat from his earlier statements to the police. However, the prosecution witness's version of the events was corroborated by the investigating officer's testimony regarding his interview with Calf Looking the morning after the incident. Thus, despite the fact that the investigating officer's testimony impeaching Calf Looking may not be substantive evidence, it tends to bolster the direct testimony of the prosecution's key witness. Moreover, Calf

Looking testified that he heard the shot, and that he ran because he "must have been scared" of Old Chief.

In addition, a rational fact finder could conclude that the testimony offered by Old Chief's two defense witnesses was not credible. Given the inconsistencies between the witnesses' accounts of the day's events, a rational fact finder could reasonably disregard both their testimony in favor of that of the prosecution witness. Thus, considering the prosecution witness's testimony, and Calf Looking's statements regarding his fear of Old Chief, a rational trier of fact could find sufficient evidence to convict Old Chief on the assault charge.

IV. REFUSAL TO CONDUCT A POST-VERDICT EVIDENTIARY HEARING.

A district court's denial of a motion for a post-verdict evidentiary hearing is reviewed for an abuse of discretion. *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986), *cert. denied* 483 U.S. 1008 (1987). Old Chief argues that the district court should have conducted such a hearing to determine whether one juror's question to the judge and a second juror's whispers during the jury poll improperly influenced the jury's deliberations.

Despite Old Chief's attempt to characterize the whispers of one juror to another during the jury poll as an "outside influence," he made no showing of improper external influence sufficient to warrant a post-verdict evidentiary hearing. *See Tanner v. United States*, 483 U.S. 107, 127 (1987) (holding that district court did not err in deciding that a post-verdict hearing was unnecessary,

despite juror's allegations of excessive alcohol consumption and illegal drug use during deliberations).

This Court has held that "where a trial court learns of a possible incident of jury misconduct, it is preferable to hold an evidentiary hearing 'to determine the precise nature of the *extraneous* information.' [internal citations omitted] [however,] not every allegation that extraneous information has reached the jury requires a full-dress hearing." *United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir. 1986) (emphasis added). Under *Tanner* and *Langford*, the jury's exposure or access to improper *external* influence guides the decision whether a court should conduct a post-verdict evidentiary hearing.

Here, the juror's rather innocuous question to the court during the poll – and the other juror's "urging," if any, – did not imply any improper external influence on the jury's deliberations. Thus, the district court acted within its discretion in declining to contact the juror in order to hold a post-verdict evidentiary hearing.

V. IMPOSITION OF A 57-MONTH UPWARD DEPARTURE TO A TOTAL SENTENCE OF 120 MONTHS ON THE UNLAWFUL POSSESSION CHARGE.

Finally, Old Chief argues that the district court made an unreasonable upward departure in his sentence on the unlawful possession charge, thus, violating the Sentencing Reform Act of 1984 and the Sentencing Guidelines. Old Chief's arguments on this issue have merit.

Because this was his third felony assault conviction in federal court, Old Chief was designated a "career

offender." Given this designation and the levels of his current offenses, the maximum sentence Old Chief could have received under the Guidelines was 51-63 months. The district court, however, departed upward to a sentence of 120 months, imposing an additional 57-month sentence on the unlawful possession count. The term of 60 months on the assault charge, was to be served concurrently. Thus, in effect, what should have been a five-year sentence, became a ten-year sentence. Moreover, the Guidelines impose a mandatory five-year enhancement on the "use" conviction, which the judge ordered to be served consecutively.

This Court established a three-step process for the review of an upward departure from the Sentencing Guidelines in *United States v. Lira-Barraza*, 941 F.2d 745 (9th Cir. 1991) (en banc). First, the reviewing court must determine if the district court had legal authority to depart. *Id.* at 746. Second, any factual findings supporting the existence of an aggravating circumstance used to support an upward departure must be reviewed for clear error. *Id.* Third, the extent of the upward departure must be reasonable in light of the structure, standards and policies of the Guidelines. *Id.* at 751.

Apparently, the district court based its upward departure on the reports of the Probation Officer and U.S. Attorney that Old Chief's serious record as a juvenile offender was not reflected in his current offender designation. An upward departure is warranted when "reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct." *See United States v. Streit*, 962 F.2d 894, 903 (9th Cir. 1992). However, the district

court "must specify the events in the defendant's criminal history that it believes are inadequately represented in the guidelines criminal history calculation." *Id.* (citing *United States v. Hoyungowa*, 930 F.2d 744, 747 (9th Cir. 1991)). The current record is, unfortunately, silent in this regard.[1]

The district court's only statement regarding Old Chief's prior history was that "Mr. Old Chief and I have got [sic] to be friends over the years." Although we might assume that this statement was meant to be an adoption of the specific factual findings contained in Old Chief's presentence report, *see Streit*, 962 F.2d at 903, the district court's statements in the current record are too ambiguous to explain the extent of its upward departure. *See United States v. Quintero*, 21 F.3d 885, 894-95 (9th Cir. 1994).

"In order to facilitate appellate review, the district court must explain in detail the reasons behind the imposition of a particular sentence, analogizing to other Guidelines provisions." *Id.* at 894 (quoting *United States v. Hicks*, 997 F.2d 594, 599 (9th Cir. 1993)). Here, the court simply stated " . . . here again we find that [Old Chief] had just been released from custody very shortly before this occurred. There is the loaded gun. And he is a danger to the community, and a serious danger. I think there's no question about that." Even if we accept these statements

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[1] We commend Assistant United States Attorney Carl Rostad for candidly acknowledging his responsibility as a prosecutor to suggest additional findings to the district court that might assist the court of appeals, especially in sentencing matters.

as an indication of aggravating factors in support of an upward departure, the district court failed to articulate the specific reasons for the *extent* of its departure – nearly double the maximum sentence – by analogy to other Guidelines provisions. *See Hicks*, 997 F.2d at 599.

"If the district court fails to articulate reasons for *the extent* of departure or if the analogy is not reasonable, [the panel on appellate review] must vacate and remand." *Id.* (emphasis in original) (quoting *Streit*, 962 F.2d at 903). Here, because the district court neither articulated the reasons for such an extreme departure, nor analogized the reasons to particular provisions of the Guidelines, we are unable to evaluate the reasonableness of the sentence imposed as required under *Lira-Barraza*. Thus, we vacate Old Chief's sentence and remand the case for resentencing consistent with the guidelines set forth above.

VI. CONCLUSION

The district court did not abuse its discretion by allowing the prosecution to introduce extrinsic evidence of Old Chief's prior conviction, despite his offer to stipulate. Further, the district court did not err by refusing to order the prosecution to compare the latent fingerprint found on the weapon clip to the other witnesses at the scene of the offenses. The prosecution satisfied its *Brady* obligation by providing Old Chief with the potentially exculpatory evidence that the latent print did not match his known prints.

The evidence was sufficient to support Old Chief's conviction on the assault charge; and, the district court did not abuse its discretion when it refused to conduct a

post-verdict evidentiary hearing regarding alleged jury misconduct. As such, Old Chief's convictions are **AFFIRMED.**

However, because the district court failed to articulate specific reasons for its extreme upward departure by analogy to the federal sentencing guidelines, we vacate Old Chief's sentence and **REMAND FOR RESENTENCING.**

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY LYNN OLD CHIEF, Defendant-Appellant.	No. 94-30277 D.C. No. CR-94-03-GF-PGH **ORDER**

Before: **WRIGHT, POOLE** and **WIGGINS,** Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

GREAT FALLS DIVISION

UNITED STATES OF AMERICA, Plaintiff vs. JOHNNY LYNN OLD CHIEF, Defendant.	NO. CR-94-003-GF JUDGMENT AND COMMITMENT

The Defendant, **Johnny Lynn Old Chief,** was previously sentenced by this court to a term of imprisonment of 180 months following his conviction for being a felon in possession of a firearm, using or carrying a firearm during the commission of a violent crime, and assault with a dangerous weapon, as charged in Counts I, II and III of the Indictment, respectively. The 180 month sentence imposed by the court envisioned an upward departure of 57 months from the maximum sentence prescribed under the United States Sentencing Commission Guidelines.[1] On May 31, 1995, the sentence was vacated by the

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[1] Application of the sentencing guidelines to Counts I and III of the Indictment yielded a guideline range of 51-63 months. The court departed upward 57 months from the maximum end of this guideline range imposing a sentence on Count I of 120

Ninth Circuit Court of Appeals and remanded for resentencing because this court failed to articulate specific reasons for the upward departure from the sentencing guidelines.

Consistent with the mandate of the Ninth Circuit Court of Appeals, the court held a second sentencing hearing on July 10, 1995. The United States was represented by Carl E. Rostad, Assistant United States Attorney for its District of Montana. The defendant, appeared in person and was represented by his counsel, Daniel Donovan, Federal Public Defender, Great Falls, Montana 59401. Having considered the arguments presented by the parties, it is the determination of this court that an upward departure from the sentencing guidelines, in the amount of 57 months, is appropriate because the guidelines fail to account for the defendant's criminal behavior as a juvenile. The defendant's juvenile record reveals repeated probation violations over a 7 year period, in which the defendant's criminal behavior became progressively more assaultive. Because the applicable guideline range contemplates only those criminal acts committed by the defendant in the 11 years he has been an adult, the guidelines do not adequately reflect either: (i) the scope of the defendant's violent criminal behavior;

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months, and a sentence on Count III of 60 months, the latter sentence to run concurrently with the term on Count i.

Application of the sentencing guidelines and 18 U.S.C. § 924(c) to Count II of the Indictment yielded a mandatory sentence of 60 months to be served consecutive to the term of imprisonment imposed on Counts I and III. With the mandatory enhancement the total sentence imposed, for all counts, was 180 months.

(ii) the escalating nature of the defendant's violence, in both frequency and severity; or (iii) the serious risk that the defendant will commit a more violent crime upon his release from prison.

The extent of the court's upward departure was determined by analogy to the sentencing guidelines. The court began from the premise that the defendant's criminal activity, as an adult, places him at offense level 17, in criminal history category VI. The court then calculated the number of additional criminal history points the defendant would have incurred, if his juvenile record were scored under the guidelines (i.e. 7 criminal history points).[2] Cognizant that 7 criminal history points is

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[2] Set forth below is an abbreviated summary of the defendant's criminal history as a juvenile. A more complete summary is provided in the Presentence Report prepared by the Probation Department. Following the description of each adjudication are the criminal history points the defendant would have received, if the guidelines were applicable to the juvenile record.

1. In December of 1977, the defendant, who was then 14 years old, pled true to an information which alleged juvenile delinquency for two counts of burglary and one count of theft. The defendant was placed on probation for the balance of his minority. [1 point – § 4A1.1(c)]
2. In May of 1978, an information was filed against the defendant which alleged juvenile delinquency for assault with a knife. The information was eventually dismissed in favor of a probation violation for the defendant's participation in the theft of a truck, and the defendant's failure to comply with the alcohol and curfew conditions of his probation. The defendant was committed to the custody of Yellowstone Boys Ranch in

equivalent to a criminal history category increase of 2⅓ levels, the court moved incrementally down the sentencing

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Billings, Montana, for observation and study. [1 point – § 4 A1.1(c)]

3. In October of 1978, the defendant violated the conditions of his probation a second time.
4. In January of 1979, the defendant enrolled at the Chemawa Indian School in Salem, Oregon. Two months later he was expelled for fighting and drinking. In October of 1979, the defendant enrolled at the Kicking Horse Job Corps Center in Ronan, Montana. Five months later the defendant was expelled because he repeatedly violated the rules and regulations of the Job Corps Center. The infractions included: (i) possession and use of drugs; (ii) possession and the manufacture of weapons; and (iii) possession of stolen property.
5. In June of 1980, the defendant's probation was violated because he participated in the burglary of a grocery store in Browning, Montana. The defendant was committed to the custody of Pine Hills School in Miles City, Montana, for a period of observation and study. [1 point – § 4A1.1(c)].
6. In October of 1980, the defendant was placed in a foster home in Alaska. While under the supervision of the District of Alaska, the defendant was allegedly involved in a fight with a student at school, and attempted to have marijuana mailed to him from Browning, Montana.
7. In November of 1981, the defendant shot a man in the face with a sawed-off shotgun. Although the shooting was subsequently determined to be in self-defense, the defendant's probation was violated because he was in possession of the illegal weapon. The defendant was committed to the custody of Pine Hills where he remained until May 12, 1982. [2 points – § 4A1.1B].

table from offense level 17 to offense level 24 – a move of three offense levels for each criminal history category increase attendant to the defendant's juvenile record.[3] Mindful that offense level 24 in criminal history category VI prescribes a guideline range of 100-125 months, the court

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8. In June of 1982, the Probation Department was advised that the defendant had become intoxicated in a bar, assaulted his girlfriend, and was involved in a fight.
9. On July 16, 1982, the Probation Department was advised that the defendant had shot another person in the foot. An arrest warrant was subsequently issued. Prior to the defendant's arrest, the Probation Department was advised by the Bureau of Indian Affairs ("BIA") that the defendant had eluded arrest, by driving his car at a high rate of speed through Browning, Montana, on one occasion, and by barricading himself inside his parent's home, on a second occasion. The defendant pled true to these events in connection with his fifth probation violation. [1 point – § 4A1.1(c)].
10. As a consequence of his fifth probation violation, the defendant was required to enroll at the Flandreau Indian School in Flandreau South Dakota. In October of 1982, the defendant was expelled from the Flandreau school for seriously assaulting another student. The expulsion gave rise to the defendant's sixth probation violation. [1 point – 4A1.1(c)]
11. In July of 1983, the defendant was involved in a high speed motor vehicle chase with BIA law enforcement officers. [1 point – 4A1.1(c)]

[3] The official commentary of the Sentencing Commission provides that an upward departure in criminal history category VI is to be structured by moving incrementally down the sentencing table to the next higher offense level in criminal history category VI until the court finds a guideline range appropriate for the case.

imposed a sentence of 120 months for Count I of the Indictment, a sentence which is reasonable in view of the structure, standards and policies of the guidelines.

Pursuant to the Sentencing Reform Act of 1984, IT IS THEREFORE THE JUDGMENT OF THE COURT that the defendant, **JOHNNY LYNN OLD CHIEF,** is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of ONE HUNDRED TWENTY (120) MONTHS on Count I; and a term of SIXTY (60) MONTHS on Count III; the term on Count III to run concurrently with the term on Count I. As to Count II, the applicable statute requires a five-year mandatory enhancement, in addition to the above sentence, to be served consecutively to the terms imposed for Counts I and III. The terms of imprisonment imposed by this judgment shall run concurrently with the term of imprisonment imposed upon the defendant by this court in criminal proceeding No. CR-89-025-GF.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS on each of Counts I and III, with both terms to run concurrently. Within 72 hours of his release from custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which he is released.

While on supervised release, the defendant shall not commit another federal, state or local crime, pursuant to § 5B1.3(a) of the sentencing guidelines, shall comply with the standard conditions that have been adopted by this court; and shall comply with the following additional conditions:

(1) the defendant shall be prohibited from possessing a firearm or other dangerous weapon;

(2) the defendant shall participate in a program of testing and treatment for drug and alcohol abuse, as directed by the United States Probation Officer, until such time as the defendant is released from the program by the probation officer;

(3) the defendant shall submit his person, residence, office and vehicle to a search, conducted by the United States Probation Officer, at a reasonable time and in a reasonable manner, based on a reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn all other persons who occupy his residence, that the premises may be subject to searches; and

(4) the defendant shall pay a special assessment to the United States in the amount of ONE HUNDRED FIFTY AND NO/100 DOLLARS ($150.00), to be deposited into a special Crime Victims Fund, pursuant to 18 U.S.C. § 3013; payable immediately.

DATED this 25 day of August, 1995.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

SUPREME COURT OF THE UNITED STATES

No. 95-6556

Johnny Lynn Old Chief,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 20, 1996

(5)

No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

ANTHONY R. GALLAGHER
Federal Defender for the District of Montana

*DANIEL DONOVAN
Assistant Federal Defender

Federal Defenders of Montana
#9 Third Street North, Suite 302
P. O. Box 3547
Great Falls, Montana 59403-3547
(406) 727-5328
Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

If the defendant in a felon in possession of a firearm case offers to stipulate to his status as a felon, should the district court require the government to accept the stipulation and preclude the government from introducing evidence of the nature of the prior felony conviction?

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OPINION BELOW

The opinion of the court of appeals is unreported, but the judgment is noted at 56 F.3d 75 (Table). (reprinted at J.A. 49-59). The order denying rehearing and rejecting the suggestion for rehearing *en banc* is also unreported. J.A. 60.

JURISDICTION

The court of appeals entered its judgment on May 31, 1995. J.A. 49. A petition for rehearing and suggestion for rehearing *en banc* was denied on August 2, 1995. J.A. 60. The petition for a writ of certiorari was filed on October 30, 1995. On February 20, 1996, this Court granted certiorari along with petitioner's motion to proceed *in forma pauperis*. J.A. 68. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Fifth and Sixth Amendments to the U.S. Constitution are reproduced at App. 1a. The relevant provisions of 18 U.S.C. §§ 922 and 921 (Supp. 1996) are reproduced at App. 1a-2a.

Congress enacted the Federal Rules of Evidence in 1975. Pub. L. No. 93-595, 88 Stat. 1926 (1975), 28 U.S.C. App. (1988). The complete text of Rules 105, 401, 402, 403, 404 and 609 are reproduced at App. 2a-5a. The Advisory Committee's Notes are set forth in full in Federal Rules of

Evidence for the United States Courts and Magistrates (West Publishing Co. 1995).

STATEMENT OF THE CASE

In February, 1994, Petitioner Johnny Lynn Old Chief was indicted in the United States District Court for the District of Montana for felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (Count I); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Count II); and assault with a dangerous weapon, in violation of 18 U.S.C. §§ 1153 and 113(c) (Count III). J.A. 3-5. The predicate felony for Count I was Old Chief's 1989 conviction in the same United States District Court for assault resulting in serious bodily injury. J.A. 3-4. Despite Old Chief's offer to stipulate, the trial court admitted evidence of his prior felony assault conviction. J.A. 6-11; 21. Old Chief did not testify at trial. The jury found Old Chief guilty of all three counts. Tr. 337-338. Old Chief was sentenced to imprisonment for a total of fifteen years.[1] J.A. 46-47; 66. He is presently incarcerated.

[1] Old Chief has appealed his sentence to the Ninth Circuit twice. The first time, the circuit panel vacated his sentence and remanded for resentencing. J.A. 59. On remand, the district court imposed the same fifteen year sentence. J.A. 66. Old Chief appealed from the second judgment and review of his sentence is presently pending in the Ninth Circuit in case No. 95-30283. Old Chief's sentence is not an issue in the case before this Court.

1. Relevant Facts

The events that led to this case occurred after a group of people went on drinking binges that lasted several days. Tr. 100, 128, 140, 154, 284. Unfortunately, drinking to the point of memory loss is not uncommon on the Blackfeet Indian Reservation in Browning, Montana. Tr. 118-119, 128, 140-141. Following a drunken fist fight, a gun was discharged but no one was hurt. Tr. 130-132. The gun belonged to someone other than Old Chief, and had been secreted under the driver's side of the seat in the truck in which Old Chief had been riding, but which was neither owned nor driven by him. Tr. 240-241, 190, 82, 252. Bullets and a shell casing were found in Old Chief's pocket, but the fingerprint lifted from the hand gun was not Old Chief's. Tr. 168, 219, 221.

There is conflicting eyewitness testimony: some of it identifies another of the drinkers as the shooter, some of it confirms the incident but does not directly implicate Old Chief as the shooter. Tr. 94, 97, 110, 123, 139. Significantly, the only witness who identified Old Chief as the shooter, Ms. Everybody Talks About, had earlier admitted that she was the one who shot the gun. Tr. 243. Another person involved, Ms. Spotted Eagle, admitted that she, and not Old Chief, shot the gun. Tr. 265-266. Over objection, evidence of Old Chief's prior felony assault conviction was presented to the jury. J.A. 18-22; Tr. 74-75.

2. Motion in Limine

Prior to trial, Old Chief moved the district court *in limine* to order that the prosecution be restricted from offering any information or details about Old Chief's

prior felony conviction, except to state that he had been convicted of a crime punishable by imprisonment exceeding one year. J.A. 6-10. Old Chief asserted that the jury would be unfairly influenced to convict him of the pending assault counts if informed that he had previously been convicted of assault resulting in serious bodily injury. J.A. 7, 10.

Old Chief offered to stipulate to his status as a felon. J.A. 7. He requested the district court to instruct the jury that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year." *See* Defendant's Proposed Jury Instruction No. 7. J.A. 11. The government refused the offered stipulation, claiming that it should not be "compelled to accept a stipulation when offered." J.A. 12. Although the prosecutor knew that § 922(g)(1) "requires proof of the *existence* of a felony," he never stated why evidence of the *nature* of the felony was necessary. J.A. 13 (emphasis added). The government never asserted that it needed Old Chief's prior assault conviction as "other crimes evidence" under the Fed. R. Evid. 404(b) exception.

Following submission of written arguments, the district court held a pretrial hearing on the motion *in limine*. J.A. 14-16. The district court denied the motion *in limine* stating, "[i]f he [the prosecutor] doesn't want to stipulate, he doesn't have to." J.A. 16. A one-line written order denying the motion followed, devoid of any reasons for the denial. J.A. 17.

3. Evidence of Prior Assault Conviction Admitted at Trial

Over objection, a certified copy of Old Chief's 1989 federal conviction of assault resulting in serious bodily injury was admitted into evidence. J.A. 21. This unredacted document specifies that Old Chief "did knowingly and unlawfully assault Rory Dean Fenner, said assault resulting in serious bodily injury" and further states that Old Chief be imprisoned therefor for five years. J.A. 18-19.

The jury heard about the prior felony assault during five stages of the trial. First, the indictment was read to the jury at the start of voir dire. Tr. 25. Second, the prosecutor mentioned it in the government's opening statement. Tr. 52. (" * * * the defendant was, indeed, convicted of a felony at that time, assault resulting in serious bodily injury"). Third, the certified copy of the assault conviction judgment was admitted into evidence as Government's Exhibit No. 1. J.A. 21; Tr. 74-75. Fourth, the prosecutor again focused the jury's attention on the prior assault during summation. Tr. 282 (" * * * the Defendant was convicted of assault resulting in serious bodily injury here in this Court"). Finally, twice during the charge to the jury, the trial court specifically mentioned Old Chief's assault resulting in serious bodily injury conviction. J.A. 33, 34.

After reading the instructions to the jury, the trial court held an instructions conference pursuant to Fed R. Crim. P. 30. Tr. 331-335. The trial court overruled Old Chief's objections to the instructions and did not modify its written instructions. Tr. 333-335. After the jury retired

to deliberate, the jurors were provided with Government's Exhibit No. 1 along with a written copy of the trial court's jury instructions. Tr. 331-333.

4. Opinion of the Court of Appeals

The Ninth Circuit Court of Appeals affirmed. J.A. 49-59. A panel of that court held that the trial court did not abuse its discretion in admitting evidence of the nature of Old Chief's prior felony assault conviction. J.A. 50-51. Citing *United States v. Breitkreutz*, 8 F.3d 688, 690, 691-692 (9th Cir. 1993), the three judges reasoned that "the government is entitled to prove a prior felony offense through introduction of probative evidence" and that a stipulation "has no place in the FRE 403 balancing process." J.A. 51. The court also limited application of *United States v. Hernandez*, 27 F.3d 1403 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1147 (1995), to the "proposition that a defendant's stipulation to a prior felony conviction is sufficient evidence to fulfill the requisite element of § 922(g)(1)." J.A. 51. The court declined to extend *Hernandez* to support "the quite different proposition" that the government must always accept a defendant's stipulation to a prior felony to prove the prior felony conviction element of § 922(g)(1). J.A. 51.

Old Chief subsequently filed a petition for rehearing and suggestion for rehearing *en banc*. He contended that the panel's opinion failed to address a conflict in the Ninth Circuit as to whether the government can be required to stipulate, in a § 922(g)(1) case, that a defendant has a prior felony conviction, citing *United States v. Barker*, 1 F.3d 957, 959 n.3 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365 (1994) and *United States v. Breitkreutz*, 8 F.3d 688, 690-692 (9th Cir. 1993). The petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected. J.A. 60.

SUMMARY OF ARGUMENT

The plain language of Title 18, United States Code, § 922(g)(1) proscribes firearm possession by a person convicted of a felony, defined as a crime punishable by imprisonment exceeding one year. Section 922(g)(1) is a status crime. Neither the description and nature, nor the name and factual details, of the prior felony conviction are elements of Section 922(g)(1).

The issue of consequence in a § 922(g)(1) prosecution is the defendant's status as a felon. The character and details of the prior felony are irrelevant and immaterial. The majority circuit rule excludes such evidence. Section 922(g)(1) does not embrace additional facts such as a particular kind of felony.

With few exceptions, the Federal Rules of Evidence do not allow evidence of a defendant's prior criminal record to be admitted at trial. This rule is subject to some restriction, as when a prior crime is an element of the later offense. Because status as a felon is an essential element of § 922(g)(1), some prejudice from the jury's knowledge of the fact of the prior conviction is unavoidable. However, prejudice becomes unfair when the nature of the prior felony conviction is presented to the jury. Excluding the nature of the prior felony conviction can limit the prejudice from the evidence presented to the

jury. Where the danger of unfair prejudice substantially outweighs the probative value, the circuit court majority has concluded that evidence beyond the fact of the felony conviction in a § 922(g)(1) prosecution is inadmissible.

For Petitioner Old Chief, the joinder of the § 922(g)(1) count with the other counts caused an unfair spillover effect. The predicate for his § 922(g)(1) count was assault resulting in serious bodily injury. Once elevated (or diminished) to the status of a convicted felon, additional counts alleging crimes of violence further exacerbate the unfair prejudicial impact. The danger of undue prejudice by allowing the government to introduce evidence regarding the nature of Old Chief's prior felony conviction was manifest in view of the virtually identical charges in the indictment.

A stipulation to a defendant's status as a felon allows the jury to appreciate the seriousness of the predicate crime, without prejudicing the jury with potentially inflammatory specifics. If a defendant stipulates to his status as a felon, the trial court should then instruct the jury that the defendant has been convicted of a crime punishable by imprisonment for a term exceeding one year, thus satisfying the prior felony conviction element of § 922(g)(1). Stipulation to the accused's status as a felon as a procedure to eliminate unfair prejudice in § 922(g)(1) cases does not interfere with the prosecution's burden to prove every element of the crime. To the contrary, since the predicate crime is significant only to prove status, excluding the nature and circumstances of a defendant's prior felony conviction does not prevent the jury from being apprised of all the elements of a § 922(g)(1) offense. A court-mandated stipulation allows

the prosecution broad discretion to introduce the underlying circumstances of a crime when those circumstances are truly relevant to the presentation of the case.

Trial courts must be alert to factors that may undermine the fairness of the fact-finding process and infringe on the presumption of innocence. Courts must carefully guard against dilution of the presumption of innocence and exercise sound discretion to prevent any undue prejudice caused by evidence of the nature of a prior felony conviction. The trial judge in his case disregarded the danger of prejudice despite Old Chief's offer to eliminate (or reduce) unfair prejudice through the proffered stipulation. Indifference resulted in repeated reference to the nature and circumstances of the prior assaultive crime and improper jury instructions. The judge breached his duty and abused his discretion.

The jury had no need to know the nature of the prior conviction; all that it needed to know was that Old Chief had a prior conviction sufficient to sustain that element of the crime of felon in possession of a firearm. The statute requires nothing more. Fairness demands nothing less.

ARGUMENT

I. THE NATURE OF A DEFENDANT'S PRIOR FELONY CONVICTION, AS DISTINGUISHED FROM THE FACT OF THE PRIOR FELONY CONVICTION, IS NOT RELEVANT TO THE STATUS AS A FELON ELEMENT IN A FELON IN POSSESSION OF A FIREARM CASE

A. The Fact, Not the Nature, of the Prior Felony Conviction is an Element of 18 U.S.C. § 922(g)(1)

Section 922(g)(1), Title 18 U.S.C., provides in pertinent part that "[i]t shall be unlawful for any person – who has been convicted of a crime punishable by imprisonment for a term exceeding one year- * * * to * * * possess in or affecting commerce, any firearm * * * ." App. 1a. This offense, commonly called felon in possession of a firearm, requires proof of three essential elements: (1) the accused previously had been convicted of a crime punishable by a term of imprisonment exceeding one year; (2) the accused knowingly possessed a firearm; and (3) the possession was in or affecting commerce, because the firearm had travelled in interstate or foreign commerce at some point during its existence. *See, e.g., United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 797 (1996); *United States v. Mains*, 33 F.3d 1222, 1228 (10th Cir. 1994); *United States v. Rumney*, 867 F.2d 714, 721 (1st Cir. 1989), *cert. denied*, 491 U.S. 908 (1989); and Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* (4th ed. 1990) § 36.09. The element at issue here is the prior felony conviction element.

As this Court has repeatedly stated, the purpose of § 922(g)(1) and other statutes restricting the possession of firearms by certain individuals is to prevent crime. "Congress obviously determined that firearms must be kept away from persons, such as those convicted of serious crimes, who might be expected to misuse them." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119 (1983); *Scarborough v. United States*, 431 U.S. 563, 576 (1977) (" * * * the congressional plan to 'make it unlawful for a firearm * * * to be in the possession of a convicted felon' 114 Cong.Rec. 14773 (1968)"). Section § 922(g)(1) does not require description and proof of the nature, including the name and factual details, of the prior felony conviction. Rather, the plain language of the statute proscribes firearm possession by a person convicted of a felony, which is defined as a crime punishable by imprisonment exceeding one year. "The status element is a discrete and independent component of the crime, a requirement reflecting a Congressional policy that possession of a firearm is categorically prohibited for those individuals who have been convicted of a wide assortment of crimes calling for a punishment of over a year's imprisonment." *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*). Thus, § 922(g)(1) is a status crime. Possession of a firearm is illegal for an individual with a felony conviction. "What little legislative history there is that is relevant reflects an intent to impose a firearms disability on any felon based on the *fact* of conviction." *Lewis v. United States*, 445 U.S. 55, 62 (1980) (emphasis added).

Section 921(a)(20), Title 18 U.S.C., was enacted in 1968 to exclude certain prior convictions from the ambit

of § 922(g)(1) and other firearms prohibition statutes.[2] App. 1a-2a. Congress amended § 921(a)(20) in 1986.[3] However, nothing in the original or subsequent versions of § 921(a)(20) added any requirement to § 922(g)(1) that the nature, name or details be included in the prior felony conviction element of that offense. "The existence of *the fact* of a prior conviction * * * is the only information that Congress has deemed of consequence concerning the defendant's criminal record." *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*) (emphasis by the court).

Pattern jury instructions define the prior felony conviction element of § 922(g)(1) as "[t]he defendant *[name]* has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." Devitt, Blackmar, Wolff & O'Malley, *Federal Jury Practice and Instructions* (4th ed. 1990) § 36.09; *see also* Fifth Circuit Pattern Jury Instructions (Criminal Cases) (1990 ed.) No. 2.44 and Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit (1985 ed.) No. 26.[4] The *nature* of the prior felony conviction is not considered an element of § 922(g)(1).

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[2] Pub. L. 90-618, § 102, 82 Stat. 1216 (1968)

[3] Firearm Owners Protection Act, Pub. L. 99-308, § 1101, 100 Stat. 450 (1986)

[4] Fifth Circuit No. 2.44: " * * * That before the defendant possessed the firearm, the defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense."

Eleventh Circuit No. 26: " * * * That before he received the firearm the Defendant had been convicted in a court of a crime punishable by imprisonment for a term in excess of one year, that is, a felony offense."

Although the 1992 version of the Ninth Circuit model instructions suggested that the *name* of the prior felony conviction be submitted to the jury as part of the prior felony conviction element of § 922(g)(1),[5] the 1995 edition of the Ninth Circuit's model jury instructions eliminates the nature of the prior felony conviction from this element: "at the time the defendant possessed the [describe the firearm], the defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year." 9th Cir. Crim. Jury Inst. 8.19P (1995). The comment to the 1995 version of No. 8.19P recognizes the possibility of a stipulation to the prior felony element and even suggests that, in absence of such a stipulation, "the judge may wish to instruct the jury as a matter of law that a certain crime is punishable by imprisonment for a term exceeding one year." 9th Cir. Crim. Jury Instr. 8.19P comment (1995); *see also* District of Columbia Criminal Jury Instruction 4.79, comment at 477 (4th ed. 1993) (the first mention of the nature of the prior felony should be omitted when it is not "in issue in any particular case.")

While § 922(g)(1) represents a significant departure from the traditional rules of fairness concerning the admission of prior convictions into evidence (see *United States v. Wacker*, 72 F.3d 1453, 1473 (10th Cir. 1995)), there is nothing within § 922(g)(1), or its legislative history, which requires anything more than the *fact* of the prior felony conviction as an element of the offense. In short,

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[5] "At the time the defendant possessed the [*describe the firearm*], the defendant [e.g., had been convicted of [*insert name of felony*]]." 9th Cir. Crim. Jury Inst. § 8.19P (1992).

"[t]he nature of the conviction is not an element of Section 922(g)(1)." *United States v. Rhodes*, 32 F.3d 867, 871 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1130 (1995).

B. The Nature of the Prior Felony Conviction is Unnecessary, Immaterial and Irrelevant to the Status as a Felon Element of 18 U.S.C. § 922(g)(1)

1. The Nature of the Prior Felony Conviction is Unnecessary and Immaterial

Courts which have addressed the issue have determined that the nature and details of a prior felony conviction are not necessary to prove the prior felony conviction element of a § 922(g)(1) offense. "The jury had no need to know the nature of the prior conviction; all that it needs to know is that there was a prior conviction sufficient to sustain that element of the crime." *United States v. Gilliam*, 994 F.2d 97, 103 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993). The government does not need to establish the nature of the prior felony to meet its burden of proof.[6] "The statute requires only that the government prove that the defendant 'has been convicted * * * of, a crime punishable by imprisonment for a term exceeding one year.' " *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1985). There is simply no need for evidence of the nature of a prior felony conviction in a

[6] McCormick defines "need" in the context of other crimes evidence as "the actual need for the other crimes evidence in the light of the issues and the other evidence available to the prosecution * * * ." *McCormick's Handbook of The Law of Evidence* § 190 at 453 (2nd ed. 1972).

§ 922(g)(1) prosecution. *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976) ("An important consideration relating to probative value is the prosecutorial need for such evidence."); *see also United States v. Breitkreutz*, 8 F.3d 688, 694 (9th Cir. 1993) (Norris, J., concurring) ("An unredacted judgment tells the jury something it has no need to know: the nature of the felony for which the defendant stands convicted.")

Other courts, speaking in terms of materiality, have reached similar conclusions, finding that the nature and underlying circumstances of a prior felony conviction are "obviously" and "wholly" immaterial to the defendant's *status* as a convicted felon. "Whereas the fact of the defendant's prior felony conviction is material to a felon in possession charge, the nature and underlying circumstances of a defendant's conviction are not." *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995). *See also United States v. Rhodes*, 32 F.3d 867, 874 (4th Cir. 1994) (Hamilton, J., concurring) ("obviously immaterial"), *cert. denied*, 115 S.Ct. 1130 (1995); and *Breitkreutz*, 8 F.3d at 694 (J. Norris, concurring) ("The nature of the prior felony is wholly immaterial to [the defendant's] status as a convicted felon.")

Accordingly, to prove the element of status as a felon for a § 922(g)(1) offense, the government needs only the fact of the prior conviction, not the nature of it. And only the fact of the prior conviction is material.

2. The Nature of the Prior Felony Conviction is Irrelevant

Evidence in criminal trials must be "strictly relevant to the particular offense charged." *Williams v. New York*, 337 U.S. 241, 247 (1949). Evidence is admissible under the Federal Rules of Evidence "only if" it is relevant. *Huddleston v. United States*, 485 U.S. 681, 689 (1988). The nature of the prior felony conviction is not "inherently" relevant to the prior felony conviction element of § 922(g)(1).

"Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Advisory Committee's Notes on Fed. R. Evid. 401, 28 U.S.C. App. p. 688." *Huddleston*, 485 U.S. at 689. Evidence is relevant only if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401, App. 2a; *United States v. Abel*, 469 U.S. 45, 50-51 (1984).

The name or details of the defendant's prior felony do not make it "more or less probable" under Rule 401 that the defendant is a convicted felon. *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995); *United States v. Breitkreutz*, 8 F.3d 688, 694 (9th Cir. 1993) (Norris, J., concurring) (The nature of the prior felony does not satisfy the Rule 401 definition of relevancy). Section 922(g)(1) makes the *fact* of the prior conviction "of consequence" to whether the accused is a convicted felon, but it "does not embrace additional facts such as a particular

kind of felony." *United States v. Tavares*, 21 F.3d 1, 4 (1st. Cir. 1994) (*en banc*).

A primary consideration in determining probative value is "how strongly the proffered evidence tends to prove an issue of consequence in the litigation." *United States v. Palmer*, 37 F.3d 1080, 1084 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1804 (1995). The issue of consequence in a § 922(g)(1) prosecution is the defendant's status as a felon. The nature of the felony conviction has no tendency to prove that status. If there is no need for such evidence, it has no probative value. *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976).

Evidence "which is not relevant is not admissible." Fed. R. Evid. 402, App. 2a-3a. Thus, if the evidence of the nature of the prior felony conviction is not relevant to § 922(g)(1), it is not admissible under the Federal Rules of Evidence. "An important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence." *Bruton v. United States*, 391 U.S. 123, 131 (1968) (citing *Blumenthal v. United States*, 332 U.S. 539, 559-560 (1947)).

Most circuit courts have concluded that the nature of a defendant's prior felony conviction is not relevant to a § 922(g)(1) case. "The underlying facts of the prior conviction are completely irrelevant under § 922(g)(1) * * * " *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995). "The predicate crime is significant only to demonstrate status, and a full picture of that offense is – even if not prejudicial – beside the point." *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*). The nature of the prior felony is not relevant to a § 922(g)(1) offense because

§ 922(g)(1) requires proof only of the defendant's status as a felon. *United States v. Jones*, 67 F.3d 320, 323 (D.C. Cir. 1995). "The *underlying facts* of the prior conviction * * * are completely irrelevant to § 922(g)(1)." *United States v. Gilliam*, 994 F.2d 97, 103 (2nd Cir. 1993) (emphasis by the court), *cert. denied*, 114 S.Ct. 335 (1993); *see also United States v. Milton*, 52 F.3d 78, 81 n.7 (7th Cir. 1995) (" * * * if a defendant offers to stipulate to the fact of the prior felony conviction, evidence of the nature of the conviction is irrelevant and will not be admitted."), *cert. denied*, 116 S.Ct. 222 (1995); and *United States v. Spletzer*, 535 F.2d 950, 956 (5th Cir. 1976) ("The full record of the judgment of conviction was not relevant * * * .").

The opinion of the majority of the panel in *United States v. Breitkreutz*, 8 F.3d 688, 691 n.4 (9th Cir. 1993), relied upon by the panel in Old Chief's case, is the *only* circuit court decision which has concluded that the nature of the prior felony conviction is relevant, stating " * * * while the underlying facts of the felony may not be relevant, the conviction judgment or other proof – which may state the nature of the conviction – most certainly is." This statement is illogical and without justification. The underlying facts of the prior felony conviction are one and the same as the nature of the prior felony conviction. Certainly, if the underlying facts of the prior felony are irrelevant, then the nature of the prior felony is also irrelevant. As Judge Norris pointed out in his concurring opinion, "[b]ecause the nature of the defendant's prior conviction is irrelevant to a prosecution under § 922(g), the admission of a full conviction judgment into evidence necessarily constitutes trial error." *Id.* at 694. Also, as Judge Norris noted, the majority's holding is in direct

conflict with another panel of the Ninth Circuit. *Id.* at 693. In *United States v. Barker*, 1 F.3d 957, 959 n.3 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365 (1994), the court found that the "underlying facts of the prior conviction are completely irrelevant under § 922(g)(1); the existence of the conviction itself is not."

. While the fact of the prior felony conviction is an essential element of § 922(g)(1), *see, e.g., Tavares*, 21 F.3d at 4 and *Barker*, 20 F.3d at 366 n.3, the nature of the prior felony conviction is not. *United States v. Rhodes*, 32 F.3d 867, 871 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1130 (1995). Furthermore, the fact of the prior, i.e., the defendant's status as a felon, is relevant, the nature of the prior is not. Because it was not relevant to the felon status element, the nature of Old Chief's prior assault conviction should not have been admitted into evidence or otherwise been mentioned at trial to the jury.

II. THE NATURE OF A DEFENDANT'S PRIOR FELONY CONVICTION CREATES THE DANGER OF UNFAIR PREJUDICE WHICH OUTWEIGHS ANY PROBATIVE VALUE IT MAY HAVE IN A FELON IN POSSESSION OF A FIREARM CASE

A. The Nature of a Defendant's Prior Felony Conviction is Unduly Prejudicial

1. Evidence of the Fact of a Prior Felony Conviction is Always Prejudicial

Evidence of the accused's status as a felon, without the name or underlying details of the prior conviction, is inherently prejudicial. Evidence is prejudicial if it "appeals to the jury's sympathies, arouses its sense of

horror, provokes its instincts to punish, or triggers other mainsprings of human action * * * ." 1 *Weinstein's Evidence* § 403[3], pp. 37-41. A jury is more likely to convict a defendant if it knows that he is already a convicted felon. The underlying premise of our criminal justice system is that the defendant must be tried for what he did, not for who he is. See, e.g., *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985). As stated by former Chief Justice Warren in his dissent in *Spencer v. Texas*, 385 U.S. 554, 575 (1967):

> Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a "bad man," without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him.

With few exceptions, the Federal Rules of Evidence do not allow evidence of a defendant's prior criminal record to be admitted at trial. Evidence of the criminal history of the accused is excluded by Fed. R. Evid. 404(a) unless the accused puts his character at issue. App. 3a. Fed. R. Evid. 404(b) provides that evidence of other crimes "is not admissible to prove the character of a person in order to show action in conformity therewith." App. 3a-4a. This conforms with the principle that evidence may not be admitted if its only relevance is to

show the propensity of the accused to commit another crime. See Fed. R. Evid. 404 advisory committee note.

Evidence of bad character or prior bad conduct is unfair not because it has no appreciable probative value, but because it has too much. Wigmore, *Evidence in Trials at Common Law*, § 58.2, at 1212 (Tillers rev. 1983). As this Court stated in *Michelson v. United States*, 335 U.S. 469, 475-476 (1948), evidence of other crimes is not excluded because it is irrelevant, but because "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." The Court noted that this rule may be "subject to some qualification, as when a prior crime is an element of the later offense." *Id.* at 475 n.8.

Because Congress has made status as a felon an element of § 922(g)(1), some prejudice from the jury's knowledge of the *fact* of the prior conviction is unavoidable.[7] Without question, the fact of a prior felony

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[7] Admittedly, the jury must be told that the accused is a convicted felon in order for a § 922(g)(1) offense to be proven. Efforts to completely eliminate the jury's awareness of a defendant's status as a felon, or to otherwise bifurcate the prior felony conviction element into a separate trial, have been uniformly rejected by the circuit courts. See, e.g., *United States v. Barker*, 1 F.3d 957, 959 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365, 365-366 (1994) (citing cases from the 1st, 2nd, 7th, 10th and 11th Circuits). The courts have advanced a number of reasons why the jury must be told of the fact of a defendant's prior felony conviction. First, the government would be precluded from proving an essential element of the offense. *United States v. Gilliam*, 994 F.2d 97, 100, 101-102 (2nd Cir. 1991), *cert. denied*, 114 S.Ct. 335 (1993); *United States v. Jacobs*, 44 F.3d

conviction in a § 922(g)(1) prosecution is, by itself, prejudicial. This prejudice becomes unfair when the nature of the prior felony conviction is presented to the jury. The prejudice can be limited by excluding the *nature* of the prior felony conviction from the evidence presented to the jury.

2. The Nature of a Prior Felony Conviction Creates the Danger of Unfair Prejudice

"Unfair prejudice," within the context of Fed. R. Evid. 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily,

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1219, 1224 (3rd Cir. 1995), *cert. denied*, 115 S.Ct. 1835 (1995). Second, the district court would breach its duty to instruct the jury on all essential elements of the crime charged. *United States v. Milton*, 52 F.3d 78, 80-81 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 222 (1995). Third, the jury may be confused because possession of a firearm, in and of itself, is not illegal and the jury may thus be prompted to nullify on the unwarranted belief that the defendant was charged for non-criminal conduct. *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989). Fourth, to bifurcate or otherwise preclude the jury's consideration of a defendant's status as a felon would be contrary to the presumption against special verdicts in criminal cases. *United States v. Aguilar*, 883 F.2d 662, 690 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991). In sum, such a procedure would remove an element of the crime charged from the jury's consideration, prevent the government from having its case decided by a jury and change the very nature of the charged crime. *Gilliam*, 994 F.2d at 102, *cert. denied*, 114 S.Ct. 335 (1993); *Barker*, 20 F.3d at 366. While these are very compelling reasons against precluding the jury from learning of a defendant's status as a felon, none of these reasons justify informing the jury of the *nature* of the prior felony in a § 922(g)(1) case.

an emotional one." Fed. R. Evid. 403 advisory committee note. In a criminal case, unfair prejudice is that "aspect of the evidence which makes conviction more likely because it provokes an emotional response in a jury or otherwise tends to affect adversely the jury's attitude towards the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged." *United States v. Bailleaux*, 685 F.2d 1105, 1111 (9th Cir. 1982).

The "unnecessary risk of unfair prejudice looms as clear and likely" when evidence of the nature of the prior felony is introduced in addition to evidence of the fact of the prior felony. *United States v. Tavares*, 21 F.3d 1, 6 (1st Cir. 1994) (*en banc*).[8] The nature of the prior felony offense serves only to prejudice the defendant because "it will likely influence even the most conscientious juror's perception of the defendant." *United States v. Rhodes*, 32 F.3d 867, 874 (4th Cir. 1994) (Hamilton, J., concurring), *cert. denied*, 115 S.Ct. 1130 (1995). This prejudicial impact has been described as "obvious" and "always prejudicial." *United States v. Milton*, 52 F.3d 78, 81 (4th Cir. 1995), *cert.*

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[8] The nature of the prior felony conviction is usually prejudicial to the defendant and certainly was in Old Chief's case. However, the *Tavares* court states that if a § 922(g)(1) offense is charged in a single count indictment and the predicate felony is a technical, non-violent or white collar crime, evidence of the nature of the prior felony should not be admitted even if it is beneficial, rather than prejudicial, to the defendant. *Id.* at 4. Nonetheless, in certain multiple count cases, such as where a murder charge is joined with a § 922(g)(1) count based on a non-violent predicate felony, the only way to avert prejudice, in absence of severance, would be to inform the jury of the nature of the non-violent prior conviction.

denied, 116 S.Ct. 222 (1995); *United States v. Jones*, 67 F.3d 320, 322 (D.C. Cir. 1995).

3. The Danger of Unfair Prejudice is Magnified When a Felon in Possession of Firearm Count is Joined with Other Charges

Joinder of a felon in possession of a firearm count with other charges, as in this case, may result in an "unfair spillover effect." *United States v. Jones*, 16 F.3d 487, 491 (2nd Cir. 1994). Damaging information about one defendant derived from joined counts is much more difficult for jurors to compartmentalize than evidence against separate defendants joined for trial. *United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir. 1986), *amended on denial of reh'g*, 798 F.2d 1250 (1986) ("Studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case. See Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behavior, 319, 331-35 (1985); Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Human Behavior, 339, 343, 347-51 (1985).").

4. If the Predicate Felony is the Same or Similar to the Offenses Alleged in Other Counts, the Prejudicial Effect on the Jury is Devastating to the Defendant

When the predicate felony for a § 922(g)(1) count is the same type of offense as charged in a separate count,

the prejudice is "clear." *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979). The jury will "naturally believe" that a person is guilty of the crime charged if the prosecution proves that he previously committed a similar offense. *United States v. Jones*, 67 F.3d 320, 322 n.6 (D.C. Cir. 1995). In *Gordon v. United States*, 383 F.2d 936, 939 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968), former Chief Justice Burger, then a Judge of the District of Columbia Circuit, recognized the undue prejudice caused by evidence of a prior felony conviction which is similar to the offense charged:

> *A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial.* [footnote omitted] Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." *As a general guide, those convictions which are for the same crime should be admitted sparingly* * * * .

(emphasis added). The impact of evidence of a similar prior offense is devastating to the defendant. As the Ninth Circuit has stated:

> *To allow evidence of a prior conviction of the very crime for which a defendant is on trial may be devastating in its potential impact on a jury.* As we recognized in *United States v. Field*, 625 F.2d 862, 872 (9th Cir. 1980), where, as here, the prior conviction is sufficiently similar to the crime charged, there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a

> conclusion which is impermissible in law: *because he did it before, he must have done it again.* Such a risk was clearly present in this case.

United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985) (emphasis added), *cert. denied*, 475 U.S. 1023 (1986); *see also, Jones v. United States*, 404 F.2d 212, 216 (D.C. Cir. 1968) (Wright, J., concurring) (" * * * 'if he did it before he probably did so this time.' ").

B. Applying the Balancing Test: The Probative Value of the Nature of the Prior Felony Conviction is Outweighed by the Danger of Unfair Prejudice

When there is a danger that a defendant's case will be affected because of the non-probative aspect of evidence offered for admission, the courts apply the balancing test of Rule 403 and decide whether to exclude the evidence. *Bailleaux*, 685 F.2d at 1111, n.2. Where the *danger* of unfair prejudice *"substantially outweighs"* the probative value, the evidence may be excluded. *Ibid.* (emphasis added)

Most courts, in applying the 403 balancing test to the nature of prior felony conviction in a § 922(g)(1) prosecution, have concluded that such evidence is inadmissible. "[E]vidence beyond the fact of the prior conviction is inadmissible absent adequate trial court findings that its non-cumulative relevance is sufficiently compelling to survive the balancing test of Fed.R.Evid. 403." *United States v. Tavares*, 21 F.3d 1, 5 (1st Cir. 1994) *(en banc)*; *United States v. Spletzer*, 535 F.2d 950, 955-956 (5th Cir. 1976). In cases where the defendant is willing to concede

the existence of one prior felony conviction, the trial court "should ordinarily preclude the government from introducing any evidence as to the nature or substance of the conviction, as the probative value of this additional information generally will be overshadowed by its prejudicial effect under Federal Rule of Evidence 403." *United States v. Wacker*, 72 F.3d 1453, 1473 (10th Cir. 1995). "Federal Rule of Evidence 403 embodies the concern for a defendant's right to a fair trial and requires the district court to reject evidence whose prejudicial effect substantially outweighs its probative value." *United States v. Jones*, 67 F.3d 320, 322 (D.C. Cir. 1995). *See also United States v. Gilliam*, 994 F.2d 97, 102-104 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993); *United States v. Rhodes*, 32 F.3d 867, 875-876 (4th Cir. 1994) (Hamilton, J., concurring), *cert. denied*, 115 S.Ct. 1130 (1995); *and United States v. King*, 897 F.2d 911, 913-914 (7th Cir. 1990).

The majority of the panel in *United States v. Breitkreutz*, 8 F.3d 688, 691-692 (9th Cir. 1993) ruled that the Rule 403 balancing process does not apply in a § 922(g)(1) prosecution where the defendant is willing to stipulate to his status as a felon. Most other courts, including those cited above, have determined that an offer to stipulate must be considered when weighing the probative value of evidence against the danger of unfair prejudice under Rule 403. *Compare United States v. Quintero*, 872 F.2d 107, 111 (5th Cir. 1989), *cert. denied*, 496 U.S. 905 (1990); *United States v. O'Shea*, 724 F.2d 1514, 1516 (11th Cir. 1984) (A stipulation is "one factor to be considered in the 403 balancing process."); *United States v. Williford*, 764 F.2d 1493, 1498 (11th Cir. 1985) (" * * * we analyze the offer to stipulate as one factor in making the

Rule 403 determination."). The *Breitkreutz* majority essentially concedes that in every case where the probative value of the nature of a prior felony conviction is weighed against its potential for unfair prejudice, "the Rule 403 balance would tip against the prosecution's evidence because it inevitably would have little, if any, probative value." *Id.* at 692. As stated in the concurring opinion, there is "no need to engage in a balancing test under Rule 403 * * * because there is no probative evidence to be weighed against its prejudicial effect." *Id.* at 694 (Norris, J., concurring). By focusing only on the stipulation, the *Breitkreutz* majority sidesteps the correct 403 analysis. Although it must be considered, a stipulation does not get weighed in the 403 balancing process. Instead, trial courts must weigh the evidence which would be admitted in absence of the stipulation. The focus of 403 is on the probative value of the evidence and on the danger of unfair prejudice which the evidence may create. If the danger of unfair prejudice substantially outweighs the probative value of the evidence, then a remedy should be considered. Trial courts must take precautions to ensure that evidence does not unduly prejudice the defendant. *United States v. Abel*, 469 U.S. 45, 54-55 (1984). Consideration of a remedy does not foreclose the application of Rule 403. When considered as a remedy, a stipulation allows the probative fact of the prior felony conviction into evidence but eliminates its prejudicial nature. The *Breitkreutz* majority was wrong not to apply the 403 analysis merely because it objected to stipulation as a form of remedy.

In other situations where a prior conviction may be introduced into evidence, the 403-type balancing test is

applied. Whether other crimes may be admissible under Fed. R. Evid. 404(b) is subject to the 403 analysis. See Fed. R. Evid. 404 advisory committee note ("The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence *in view of the availability of other means of proof* and other factors appropriate for making decisions of this kind under Rule 403.") (emphasis added); *Huddleston v. United States*, 485 U.S. 681, 688 (1988). A 403-type of balancing analysis is factored into Fed. R. Evid. 609.[9] There, with

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[9] Fed. R. Evid. 609 provides, in relevant part, that "[f]or the purpose of attacking the credibility of [the accused as a] witness . . . evidence that [the] accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused, and . . . evidence that any witness [including the accused] has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment." App. 4a-5a. Use of convictions to impeach has "generated enormous controversy" because of the "obvious risk of prejudice" and because of "lingering doubts" over the value of this method of impeachment. See Mueller and Kirkpatrick, *Federal Evidence* (2nd ed. 1994), Vol. 3, § 273 p. 211 (for summary of debates and amendments leading to the present form of Rule 609 see pp. 211-227). Because Old Chief did not testify at trial, he was not impeached with his prior felony assault under Rule 609. Nonetheless, an analysis of the impact of Rule 609 is instructive.

Usually, when impeaching a defendant who has testified pursuant to Rule 609, the cross-examiner may ask the defendant about the date and nature of a prior felony conviction and the punishment imposed. See, e.g., *United States v. Dow*, 457 F.2d 246, 250 (7th Cir. 1972). Under common practice, trial courts exclude the nature of the prior felony from Rule 609 impeachment if prejudicial to the defendant. This remedy is virtually never appealed. However, in at least two reported

the exception of prior dishonesty or false statement offenses, a prior felony is not admissible to impeach the credibility of a testifying defendant unless the trial court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused.

In § 922(g)(1) cases, the Rule 403 balancing test must be applied to evidence of the nature of a defendant's prior felony conviction. Because the danger of unfair prejudice of such evidence substantially outweighs any possible probative value, a trial court must apply a remedy to exclude the evidence.

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cases, the reviewing court affirmed the decision of the trial court to limit impeachment by use of the fact of the prior felony only, thereby excluding evidence of the nature of the prior felony.

In *United States v. Fountain*, 642 F.2d 1083, 1091-1092 (7th Cir. 1981), *cert. denied*, 451 U.S. 993 (1981), where the defendant was charged with first degree murder and had a prior conviction of premeditated murder, the jury was told that the defendant had previously committed a serious crime but "they did not know *which* serious crime he had committed." (emphasis by the court). In *United States v. Fay*, 668 F.2d 375 (8th Cir. 1981), the defendant was charged with several counts of assault including assault resulting in serious bodily injury. The defendant had a prior conviction of assault with a deadly weapon. *Id.* at 379. The court approved the trial court's limitation of the prejudicial effect by "prohibiting the disclosure of the *nature* of the assault conviction" during Rule 609 impeachment. *Ibid.* (emphasis added). If evidence of the nature of a defendant's prior felony conviction can be excluded under Rule 609, such evidence can and should be excluded in a § 922(g)(1) case.

C. The Nature of His Prior Felony Conviction was Unduly Prejudicial to Old Chief

The prosecution in this case never attempted to establish the relevancy of the nature of Old Chief's prior assault conviction – either before, during or after trial. As demonstrated above, no cases have logically established that the nature of a prior felony conviction is relevant in a § 922(g)(1) case. Thus, the nature of Old Chief's prior felony assault conviction should not have been admissible under Fed. R. Evid. 401 and 402.

For Old Chief, the "unfair spillover effect" of the joinder of the § 922(g)(1) count with the other counts was obvious. The predicate felony for his § 922(g)(1) count is assault resulting in serious bodily injury. Where the predicate felony involves violence, the prejudicial impact of such evidence is "further exacerbated" when the additional counts allege crimes of violence. See *United States v. Rhodes*, 32 F.3d 867, 874-875 (4th Cir. 1994) (Hamilton, J., concurring), *cert. denied*, 115 S.Ct. 1130 (1995). Counts II and III against Old Chief were crimes of violence and were even labelled as such in the trial court's jury instructions. J.A. 36, 37. "That jurors might be more inclined to convict defendants who have committed violent * * * crimes * * * is precisely why the jury should not be informed of the underlying facts of the prior conviction." *United States v. Breitkreutz*, 8 F.3d 688, 694 (9th Cir. 1993) (Norris, J., concurring).

The probative value of the nature of Old Chief's prior felony assault conviction to the § 922(g)(1) count was nil. The danger of unfair prejudice caused by this prior assault, particularly as to the jury's consideration of his

guilt or innocence of the assault with a deadly weapon charge, was extremely high. "[T]he danger of undue prejudice by allowing the government to introduce evidence regarding the nature of [the defendant's] prior felony conviction was *manifest* in view of the virtually identical charges in the indictment." *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1995). (Emphasis added). The probative value of the nature of Old Chief's predicate felony was *substantially outweighed* by the danger of unfair prejudice. Thus, evidence of the nature of the felony should have been excluded under Fed. R. Evid. 403.

III. THE DISTRICT COURT SHOULD REQUIRE THE GOVERNMENT TO STIPULATE TO THE DEFENDANT'S STATUS AS A FELON AND PRECLUDE THE GOVERNMENT FROM INTRODUCING EVIDENCE OF THE NATURE OF THE PRIOR FELONY CONVICTION IN A FELON IN POSSESSION OF A FIREARM CASE

A. A Stipulation to a Defendant's Status as a Felon is the Most Appropriate and Least Intrusive Remedy

A stipulation to a defendant's status as a felon is the most appropriate and least intrusive remedy to the danger of prejudice from the nature of the prior felony. If a defendant stipulates to his status as a felon, the trial court may then instruct the jury that the defendant "has been convicted of a crime punishable by imprisonment for a term exceeding one year," thus satisfying the prior felony

conviction element of § 922(g)(1).[10] "This allows the jury to appreciate the seriousness of the crime, without prejudicing the jury with potentially inflammatory specifics." *United States v. Gilliam*, 994 F.2d 97, 103 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993).

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[10] Other remedies for extinguishing the prejudice of the nature of a prior felony conviction in a § 922(g)(1) case have been identified, and applied, by the courts. These include a redacted record, testimony by a clerk of court, a defendant's affidavit or judicial notice of the prior conviction. *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*). Upon proper motion, the allegation of the nature of the prior felony conviction may be stricken from the indictment as surplusage pursuant to Fed R. Crim. P. 7(d). *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979); *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974) ("The granting of such a motion is proper, however, only where the words stricken are not essential to the charge."), *cert. denied*, 419 U.S. 1124 (1975). A sworn admission signed by the defendant conceding the prior felony conviction element of the offense is another alternative. *United States v. Spletzer*, 535 F.2d 950, 953 (5th Cir. 1976).

When a felon in possession of a firearm count has been joined together with other offenses in the same indictment, some courts have held that such joinder requires "either severance, bifurcation, or some other ameliorative procedure." *United States v. Jones*, 16 F.3d 487, 492 (2nd Cir. 1994); *United States v. Joshua*, 976 F.2d 844, 847-848 (3rd Cir. 1992) and *United States v. Dockery*, 955 F.2d 50, 53-54 (D.C. Cir. 1992). Severance of the § 922(g)(1) count is the obvious remedy unless evidence of the prior felony conviction would be independently admissible on the other counts. *United States v. Busic*, 587 F.2d 577, 585 (3rd Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980). Moreover, a stipulation to the nature of the prior felony conviction could sufficiently reduce prejudice so that joinder is permissible, thereby relieving the necessity to sever. *United States v. Hudson*, 53 F.3d 744, 747 n.2 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 235 (1995); *United States v. Burgess*, 791 F.2d 676, 679 (9th Cir. 1986).

At least seven circuits now require stipulation to the fact of the prior felony conviction as a remedy to the potential of undue prejudice in a § 922(g)(1) prosecution. Most recently, the Tenth Circuit held that "where a defendant offers to stipulate as to the existence of a prior felony conviction, the trial judge should permit that stipulation to go to the jury as proof of the status element of section 922(g)(1), or provide an alternative procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance." *United States v. Wacker*, 72 F.3d 1453, 1472-1473 (10th Cir. 1995). Last fall, the District of Columbia Circuit concluded that " * * * at least when the defendant stipulates to the fact of a felony conviction, the district court should avoid mentioning the nature of the prior felony to the jury." *United States v. Jones*, 67 F.3d 320, 325 n. 10 (D.C. Cir. 1995).

When a defendant offers to stipulate to the fact of the prior felony conviction, "evidence of the nature of the conviction is irrelevant and will not be admitted." *United States v. Milton*, 52 F.3d 78, 81 n.7 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 222 (1995); *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979). The following instruction was approved in *United States v. Palmer*, 37 F.3d 1080, 1085 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1804 (1995): "[T]he parties have stipulated that defendant has been convicted of a crime punishable by imprisonment for a term in excess of one year, and you should regard the second element as proven beyond a reasonable doubt." The Seventh Circuit, in *United States v. Pirovolos*, 844 F.2d 415, 420 (7th Cir. 1988) (*en banc*), *cert. denied*, 488 U.S. 857 (1988), found that "[t]he trial judge should not have admitted evidence of [the defendant's] prior convictions; the

defense's proffered stipulation that [the defendant] has been convicted of a prior felony was sufficient." *See also United States v. Tavares*, 21 F.3d 1, 3, 6 (1st Cir. 1994) (*en banc*).

Other courts have approved of stipulations to the accused's status as a felon as a procedure to eliminate unfair prejudice in § 922(g)(1) cases. In *United States v. Gilliam*, 994 F.2d 97, 99 (2nd Cir. 1993), *cert. denied*, 114 S.Ct. 335 (1993), the court approved a stipulation which "precluded documentary or testimonial proof of the conviction, thus preventing the jury from knowing the circumstances and type of the offense." The Third Circuit, in *United States v. Jacobs*, 44 F.3d 1219, 1224-1225 (3rd Cir. 1995), *cert. denied*, 115 S.Ct. 1835 (1995), approved the government's refusal to stipulate to the fact of the prior felony conviction only because "there was an independent basis [Rule 609 impeachment] for admitting the fact that the defendant's prior conviction was for burglary." The Sixth Circuit has recognized that " * * * an agreement to stipulate in the same cause [where joinder of counts is too prejudicial] could reduce prejudice enough that joinder is permissible." *United States v. Hudson*, 53 F.3d 744, 747 n.2 (6th Cir. 1995), *cert. denied*, 116 S.Ct. 235 (1995). In *United States v. Leeper*, 964 F.2d 751, 752 (8th Cir. 1992), the Eighth Circuit approved a stipulation "that the jury would be informed only that [the defendant] had been 'convicted of a crime punishable by imprisonment for a term exceeding one year.' "). *See also United States v. Felici*, 54 F.3d 504, 506 (8th Cir. 1995) ("The government simply read a stipulation * * * [n]othing was introduced regarding the nature of the prior offenses."), *cert. denied*, 116 S.Ct. 251 (1995)

In *United States v. Barker*, 1 F.3d 957, 958 (9th Cir. 1993), *amended on denial of reh'g*, 20 F.3d 365 (1994), the court approved the government's agreement "to stipulate to [the defendant's] felony status." *See also United States v. Burgess*, 791 F.2d 676, 679 (9th Cir. 1986) ("[The defendant's] prior conviction was entered on the record by stipulation which simply stated that he had previously been convicted of a crime punishable by imprisonment for a term exceeding one year. Neither the nature of the crime nor the length of sentence was disclosed. There was no further reference during the trial to [his] prior conviction.")

A stipulation to the defendant's status as a felon which provides for submission of a jury instruction that the defendant "has been convicted of a crime punishable by imprisonment for a term exceeding one year," as was requested by Old Chief, proves the prior felony conviction element of § 922(g)(1) without any additional documentation such as a redacted indictment or written admission. Such a procedure eliminates any possible prejudice from evidence of the nature of the prior felony.

B. A Stipulation to a Defendant's Status as a Felon and Preclusion of Evidence of the Nature of the Prior Felony Conviction Does Not Interfere with the Prosecution's Burden to Prove Every Element of the Offense of Felon in Possession of a Firearm

Although "[t]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense," *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 481

(1991), the fact of the prior felony conviction, not the nature of the prior felony conviction, is the element required by § 922(g)(1). Therefore, exclusion of the nature of the prior felony conviction does not interfere with the prosecution's burden to prove every element of the crime. *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994) (*en banc*) (" * * * excluding the extraneous information concerning [the] nature [of the prior felony conviction] should create no burden for either the court or the government.") Unlike *Estelle*, where this Court found that evidence of the battered child syndrome was relevant to show intent, evidence of the nature of a prior felony conviction in a § 922(g)(1) prosecution is not relevant. See, *Estelle*, *ibid*.

The government has a right to present its case as it deems fit. *Tavares*, 21 F.3d at 4. However, the government's right to present its case is subject to the Rules of Evidence and fundamental fairness. *United States v. Doerr*, 886 F.2d 944, 969 (7th Cir. 1989). This right of the government is "in no fashion weakened by requiring a stipulation to establish the defendant's status as a felon * * * [t]he predicate crime is significant only to demonstrate status, and a full picture of that offense is, even if not prejudicial, beside the point." *Tavares*, *Id*. at 4.

Generally, a party may not preclude his adversary's proof by an admission or offer to stipulate. See, e.g., *United States v. Brickey*, 426 F.2d 680, 685-686 (8th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). "Nonetheless, this principle, like all rules of evidence, is subject to the provision that where the probative value of relevant evidence is substantially outweighed by its potential for unfair prejudice, it should be excluded [citing Fed. R. Evid. 403]." *United States v. Spletzer*, 535 F.2d 950, 955-956

(5th Cir. 1976). Excluding only the nature and circumstances of a defendant's prior felony conviction does not prevent the jury from being apprised of all the elements of a § 922(g)(1) offense, including the element of a prior felony conviction, nor does it impinge on the government's right to prove all essential elements of the case. *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1995). Likewise, excluding evidence of the nature of the prior felony conviction does not modify the statute. The crime of felon in possession of a firearm would be changed only where the government was precluded from making any mention to the jury of the defendant's status as a felon. *United States v. Williams*, 612 F.2d 735, 740 (3rd Cir. 1979), *cert. denied*, 445 U.S. 934 (1980).

A stipulation to the defendant's status as a felon, thus eliminating evidence of the nature of the prior felony, is distinguishable from stipulations to the actions or state of mind of the defendant. Certainly, the prosecution has the right to present a full picture of the events of the alleged offense to the jury. *See Brickey*, 426 F.2d at 686, and *Parr v. United States*, 255 F.2d 86, 88 (5th Cir. 1958), *cert. denied*, 358 U.S. 824 (1958). But there is no authority for the proposition that a prosecutor may refuse stipulations limited solely to the question of status. *United States v. Breitkreutz*, 8 F.3d 688, 695 n.2 (9th Cir. 1993) (Norris, J., concurring). "[A] stipulation to a defendant's status as a felon is easily and obviously distinguishable from those relating to his actions or state of mind in committing the crime." *United States v. Tavares*, 21 F.3d 1, 6 (1st Cir. 1994) (*en banc*). Old Chief was not trying to prevent the government from presenting the full and real life context of the three offenses charged. Instead, he was trying to prevent

the jury from improperly basing its verdict on evidence that he had a propensity for crime. *United States v. Yeagin*, 927 F.2d 798, 802 (5th Cir. 1991).

A stipulation rule, as formulated by the First Circuit in *Tavares*, 21 F.3d at 5, would not limit the prosecutor's ability to present the details of a prior felony conviction when those details have "relevance independent of simply proving prior felony status for Section 922(g)(1)." *United States v. Wacker*, 72 F.3d 1453, 1473 (1st Cir. 1995). "Thus, the prosecution retains broad discretion to introduce the underlying circumstances of a crime when those circumstances are truly relevant to the presentation of the case." *Ibid*. "A decision to honor a stipulation concerning the predicate crime in a felon-in-possession case in no way trenches upon the right of the prosecution to make a full presentation of the crime currently charged." *Tavares*, *Id*. at 3.

C. The Government Had No Valid Reason to Refuse to Stipulate to Old Chief's Status as a Felon

A prosecutor's duty is not only to use every legitimate means to bring about a just conviction, but to refrain from improper methods calculated to produce a wrongful conviction. *Berger v. United States*, 295 U.S. 78, 88 (1935). This Court's precedent obliges the prosecutor to prevent unfair prejudice. *United States v. Daniels*, 770 F.2d 1111, 1118-1119 (D.C. Cir. 1985); *United States v. Dockery*, 955 F.2d 50, 55 (D.C. Cir. 1992). The prosecutor here "failed to discharge that obligation by opposing the

more moderate remedy proposed by the defense." *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1995).

"Unfortunately, a side consequence of [§ 922(g)(1)] has been to provide federal prosecutors with a powerful tool for circumventing the traditional rule against introduction of other crimes evidence." *Daniels, Id.* at 1118. If an ex-felon is charged with an offense involving the use of a gun, prosecutors may inform the jury of his prior conviction "merely by taking the time to include a charge of firearms possession." *Ibid.* However, as noted in one treatise, " * * * the creation of ex-felon crimes was not intended to undermine the basic principle excluding evidence of the defendant's character, particularly (it seems) in the case of firearms possession charges, which can be so readily 'tacked on' to any number of other 'substantive' offenses such as robbery." Mueller and Kirkpatrick, *Federal Evidence* (2nd ed. 1994), Vol. 1, § 105, p. 581.

At some point after § 922(g)(1) was enacted, the Department of Justice apparently determined that every § 922(g)(1) indictment should include the name, date and jurisdiction of the prior felony conviction element. Indeed, United States Attorneys have been instructed to take full advantage of the defendant's prior felony record unless prevented by circuit court precedent. Dep't of Justice Manual/United States Attorneys Manual, Vol. III(b), Title 9, Criminal Division, Chap. 63, § 9-63.513, p. 19 (July, 1992 Supp.)[11] Despite the government's official

[11] § 9-63.513 of the Manual provides: "Charging More Than One Prior Felony in an Indictment for Violation of Section 922(g). The Circuit Courts of Appeals have differed as to whether the government may properly charge more than one prior felony in an indictment for violation of 18 U.S.C. § 922(h) and 18 U.S.C. App. § 1202, the predecessor provisions of 18 U.S.C. § 922(g). Recent congressional amendments have not addressed the issue as to whether the government may seek to prove more than one prior felony conviction even if the defendant offers to stipulate that he is a convicted felon. Thus, indictments charging violations of 18 U.S.C. § 922(g) should continue to be drafted in accord with circuit court precedent, and where there is no such precedent, in the manner most advantageous to the government." *See also* the sample indictment for a § 922(g)(1) offense which directs the United States Attorney to "[s]pecify the places and dates of indictments, commitments" with respect to the allegation of the prior felony conviction element. United States Attorneys Book, Firearms 18 U.S.C. § 922(g).

posture, the courts soon recognized that "the better practice dictates" that the indictment "merely allege that the defendant is a convicted felon." *United States v. Busic*, 587 F.2d 577, 585 (3rd Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980); *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974) ("The particular factual circumstances attending the prior conviction and those of the present case would appear to make the recitation to the jury in the indictment of the detailed description of the prior conviction peculiarly prejudicial."), *cert. denied*, 419 U.S. 1124 (1975).[12]

Under Fed. R. Evid. 404(b), the prosecution must give "reasonable notice in advance of trial" of its intent to

[12] The government recently took this more enlightened approach. In *United States v. Jones*, 67 F.3d 320, 322 (D.C. Cir. 1995), the government conceded on appeal that evidence of the nature of the defendant's prior felony conviction "should not have been admitted as part of his § 922(g) prosecution once [the defendant] offered to stipulate to the fact of that conviction."

introduce other crimes evidence and of the purpose for such evidence. Although Old Chief requested such notice, no notice was provided. More importantly, the prosecution never claimed that Old Chief's prior assault was admissible under Rule 404(b). As this Court confirmed in *Huddleston v. United States*, 485 U.S. 681, 690 (1986), the offering party must show by a preponderance of the evidence that the prior crime occurred and that proof of the prior crime is relevant and admissible under Rule 404(b). "The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." *Id.* at 686. The prosecutor here never established that the prior felony assault conviction was probative of anything other than Old Chief's propensity to commit similar crimes. "The government did not seek to admit evidence of the nature of [the defendant's] prior felony conviction on alternative grounds. Hence, we have no occasion to address its admissibility under [Rule] 404(b)." *United States v. Jones*, 67 F.3d 320, 323 n.8 (D.C. Cir. 1995).

The government had no need to inform the jury of the nature of Old Chief's felony, and the clear purpose was to prejudice the jury against Old Chief. "[O]ther than the government's desire to color the jury's perception of [Old Chief's] character," the prosecution had no reason for revealing the nature of Old Chief's prior felony conviction. *United States v. Tavares*, 21 F.3d 1, 5 (1st Cir. 1994) (*en banc*). In light of Old Chief's offer to stipulate, "[t]o have made the jury aware of the nature of the offense went beyond the purpose for which the government asserted the right to introduce evidence of other crimes."

United States v. Cook, 538 F.2d 1000, 1005 (3rd Cir. 1976). As stated by Justice Blackman, dissenting in *Marshall v. Lonberger*, 459 U.S. 422, 447 (1983):

> It is enough for me in this case to note the utter absence of a legitimate state interest once the prosecution refused to accept respondent's proffered stipulation. That refusal revealed that the prosecution believed the indictment had prejudicial value, and it rendered nonexistent any otherwise legitimate interest the State might have had in introducing the indictment.

See also United States v. Foskey, 636 F.2d 517, 525-526 (D.C. Cir. 1980) ("There is a large measure of responsibility in the prosecutor to weigh the evidence independently: if its relevance is outweighed by the danger of unfairly prejudicing, confusing, or misleading the jury, it should not be introduced. The assistant United States attorney must step back from his or her partisan role and make these determinations in an objective and fair-minded fashion before proffering the evidence [footnote omitted].").

D. A Trial Court Has the Duty to Prevent Unfair Prejudice Despite the Government's Refusal to Stipulate to a Defendant's Status as a Felon

1. A Trial Court Has the Duty and Discretion to Prevent Unfair Prejudice

"[U]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser v. United States*, 315 U.S. 60, 71 (1942). Trial courts have the duty to take precautions to

ensure that evidence does not unduly prejudice the defendant. *United States v. Abel*, 469 U.S. 45, 54-55 (1984).

The presumption of innocence, although not specifically set forth in the Constitution,[13] is a "basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). "Without doubt" disclosure of the nature of the accused's prior felony conviction places an "unnecessary burden" on the presumption of innocence. *United States v. Blackburn*, 592 F.2d 300, 301 (6th Cir. 1979) (DeMascio, J., concurring). "To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice,

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[13] Old Chief's contentions have necessarily implicated the question of whether his fundamental, and indeed, constitutional rights have been infringed, including those rights protected by the Fifth and Sixth Amendments to the United States Constitution such as due process, fundamental fairness, the right to a trial by a fair and impartial jury, and the application of the presumption of innocence. In *Spencer v. Texas*, 385 U.S. 554 (1967), this Court, in a five to four decision, rejected the contention that the admission of evidence of a criminal defendant's prior convictions in the trial of the pending criminal charges was *constitutional* error because of its prejudicial effect. Nevertheless, five members of the Court, including Justice Stewart, who concurred separately, would have barred the admission of such evidence in a case invoking the exercise of the Court's *supervisory* powers over criminal procedures in the federal courts. *Id.* at 569, 573 n.4. *See also Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983). Thus, the Court can decide this case under its supervisory powers without considering any constitutional right including the Fifth Amendment standard of due process of law.

courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt [citing *In re Winship*, 397 U.S. 358, 364 (1970)]." *Estelle, Ibid.*

A trial court has "wide discretion" in determining the admissibility of evidence under the Federal Rules. *Abel, Id.* at 54. Furthermore, a trial court has the discretion to decide what procedures should be used to insulate the jury from prejudicial information. *United States v. Jacobs*, 44 F.3d 1219, 1228 (3rd Cir. 1995), *cert. denied*, 115 S.Ct. 1835 (1995). Consequently, a trial court's decision to admit or reject prejudicial evidence under Fed. R. Evid. 403 is subject to review under an abuse of discretion standard. *Abel, Id.* at 55. Nonetheless, if the record reveals that the trial court did not engage in a Rule 403 weighing analysis, the decision of the trial court need not be given any deference on appeal. *See, e.g., United States v. Talavera*, 668 F.2d 625, 631 (1st Cir. 1982), *cert. denied*, 456 U.S. 978 (1982). Only if "it appears from the record as a whole that the trial judge adequately weighed the probative value and prejudicial effect of proffered evidence before its admission," will a reviewing court conclude that the demands of Rule 403 have been met. *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978).

2. If the Government Refuses to Stipulate, a Trial Court Must Eliminate the Danger of Unfair Prejudice Caused by Evidence of the Nature of a Defendant's Prior Felony Conviction

Even in absence of a stipulation, the nature and underlying circumstances of the prior felony conviction should not be admitted in a § 922(g)(1) prosecution unless employed for proper impeachment or other necessary purposes. *United States v. Rhodes*, 32 F.3d 867, 875 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1130 (1995). If the government refuses to stipulate, the trial court should "provide an alternative procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance." *United States v. Wacker*, 72 F.3d 1453, 1472-1473 (10th Cir. 1995) (see fn. 10 above).

A trial court must take proper action to prevent any undue prejudice caused by evidence of the nature of a prior felony conviction. *United States v. Poore*, 594 F.2d 39, 42 (4th Cir. 1979); *United States v. Gilliam*, 994 F.2d 97, 102 (2nd Cir. 1993) (Had the government refused to stipulate, "the district court would have excluded any information about the nature of the prior convictions, since merely the proof of the fact of one conviction would be sufficient for § 922(g)(1)."), *cert. denied*, 114 S.Ct. 335 (1993); and *United States v. Pirovolos*, 844 F.2d 415, 420 (7th Cir. 1988) (*en banc*), *cert. denied.*, 488 U.S. 857 (1988). The trial judge's duty to limit prejudice is amplified when trying an ex-felon count together with other counts. In such a situation, "the trial judge must 'proceed with caution' to avoid undue prejudice." *United States v. Dockery*, 955 F.2d 50, 53

(D.C. Cir. 1992) (quoting *United States v. Daniels*, 770 F.2d 1111, 1118 (D.C. Cir. 1985)).

As a final protection against unfair prejudice to a defendant, the trial court, upon request, must instruct the jury that the jury can only consider evidence of a prior conviction for the purpose for which it was offered and not as an indication of criminal propensity. Fed. R. Evid. 105. If the trial court gives such a cautionary instruction, "either on request or on its own motion, the court must be careful to instruct the jury correctly as to the limited purpose for which the evidence is admitted." *United States v. Aims Back*, 588 F.2d 1283, 1287 (9th Cir. 1979).

3. The Trial Court Breached its Duty and Abused its Discretion by Admitting Evidence of Old Chief's Prior Assault Conviction

If a judge is "acutely aware" of the possibility of prejudice and is "strict" in his charge to the jury, the likelihood of undue prejudice affecting the verdict is minimized. *Schaffer v. United States*, 362 U.S. 511, 516 (1960). The trial court ignored the danger of unfair prejudice created by Old Chief's prior assault conviction. Furthermore, the trial court's jury instructions were confusing and contradictory.

The trial judge in Old Chief's case disregarded the danger of prejudice despite a written motion *in limine* and oral argument thereon. J.A. 6-10; 14-16. Rather than considering the prejudicial impact of Old Chief's prior assault, the judge denied the motion *in limine* simply because the prosecutor refused to stipulate. J.A. 16. The

judge never applied the Rule 403 balancing test. "[W]here a prior conviction is part of the offense and the defendant offers to stipulate to the prior conviction, it may constitute an abuse of discretion to allow the nature of the offense to be admitted." *United States v. O'Shea*, 724 F.2d 1514, 1516 (11th Cir. 1984).

Indifferent to its extremely prejudicial impact, the judge did not carefully or correctly instruct the jury to not consider Old Chief's prior assault conviction in determining Old Chief's guilt or innocence on the new charges. J.A. 23-42. Although the prosecutor did not present the prior assault as evidence of other crimes under Rule 404(b), the court instructed the jury to consider evidence of "other acts * * * only as it bears on the defendant's knowledge and intent and for no other purpose." J.A. 31. In direct contradiction, and despite the fact that Old Chief did not testify, the court instructed the jury to consider evidence of Old Chief's prior felony conviction "only as it may affect [his] believability as a witness. You may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." J.A. 31. Even when properly instructed, "jurors are likely to regard * * * evidence [of a prior assault] as proof of a defendant's turbulent character and to conclude that he acted consistently with that character at the time charged in the indictment." *United States v. Bettencourt*, 614 F.2d 214, 218 (9th Cir. 1980). Old Chief's jury improperly considered his propensity for assaultive behavior because the trial judge did not carefully instruct the jury.

By disregarding the unfair prejudice of Old Chief's prior assault, the trial judge failed to consider any alternative remedies to stipulation. Old Chief requested that

the jury be instructed that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year," (J.A. 11). Instead of eliminating the prejudicial impact of the prior assault, the court improperly focused the jury's attention on the nature of Old Chief's prior: " * * * I instruct you that the offense of Assault Resulting in Serious Bodily Injury is a crime in the federal courts of the United States, punishable by imprisonment for more than one year." J.A. 34.

In sum, the trial judge unnecessarily allowed undue prejudice from the nature of Old Chief's prior conviction into the trial. "[A]lthough the district court gave limiting instructions, the nature of the prior felony was repeatedly brought to the jury's attention by the judge and the prosecutor." *United States v. Jones*, 67 F.3d 320, 324 (D.C. Cir. 1995). This affected the jury's determination of Old Chief's guilt or innocence on all three counts. As in *Jones*, the district court breached its duty and abused its discretion in denying Old Chief's motion *in limine* to exclude evidence of the nature of his prior felony conviction. *Id.* Old Chief is entitled to a new trial on all three counts.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit must be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted,

ANTHONY R. GALLAGHER
Federal Defender for the District of Montana

*DANIEL DONOVAN
Assistant Federal Defender
Federal Defenders of Montana
#9 Third Street North, Suite 302
P. O. Box 3547
Great Falls, Montana 59403-3547
(406) 727-5328
Counsel for Petitioner

*Counsel of Record

April 1996

APPENDIX

APPENDIX

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * * * "

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTES

18 U.S.C. §§ 922 and 921 (Supp. 1996)

1. 18 U.S.C. § 922(g) provides:

It shall be unlawful for any person –

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year * * * to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

2. 18 U.S.C. § 921(a)(20) provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include –

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

FEDERAL RULES OF EVIDENCE

Rule 105. Limited Admissibility

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) **Character evidence generally**. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) **Character of accused**. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) **Character of victim**. Evidence of a pertinent trait of character of the victim of the

crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) **Character of witness**. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) **Other crimes, wrongs, or acts**. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) **General rule**. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall

be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) **Time limit**. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, or certificate of rehabilitation**. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudications**. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Pendency of appeal**. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(6)

No. 95-6556

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHNNY LYNN OLD CHIEF, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
ALAN JENKINS
Assistant to the Solicitor General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

44 pp

QUESTION PRESENTED

Whether the district court properly exercised its discretion, in a prosecution under 18 U.S.C. 922(g)(1) for possession of a firearm by a convicted felon, to admit evidence that petitioner was previously convicted of the felony of assault resulting in serious bodily injury when petitioner offered to stipulate to the existence of his prior felony.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 49-59) is unpublished, but the judgment is noted at 56 F.3d 75 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1995. A petition for rehearing was denied on August 2, 1995. J.A. 60. The petition for a writ of certiorari was filed on October 30, 1995, and was granted on February 20, 1996 (J.A. 68). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

Federal Rules of Evidence 401, 402, 403 and 404(b), and 18 U.S.C. 921(a)(20) and 922(g)(1) are reprinted in the appendix to this brief.

STATEMENT

After a jury trial in the United States District Court for the District of Montana, petitioner was convicted of possession of a firearm after having been convicted of a crime punishable by imprisonment for a term exceeding one year, in violation of 18 U.S.C. 922(g)(1); using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c); and assault with a dangerous weapon, in violation of 18 U.S.C. 1153 and 113(c) (1988). He was sentenced to 120 months' imprisonment on the Section 922(g)(1) charge, a concurrent 60-month prison term on the assault with a dangerous weapon charge, and a consecutive 60-month prison term on the using or carrying a firearm charge, to be followed by a three-year period of supervised release. J.A. 46-47. The court of appeals affirmed the convictions, but vacated petitioner's sentence and remanded for resentencing. J.A. 49-59.

1. On October 23, 1993, petitioner, Stephanie Spotted Eagle, and Stacy Everybody Talks About traveled in a pickup truck to several locations within the Blackfoot Indian Reservation. Petitioner, who had previously been convicted of assault resulting in serious bodily injury, had obtained a 9mm semi-automatic pistol. The group drove to a baseball field where petitioner helped Spotted Eagle fire the pistol into the air. The group then drove to a liquor store to purchase beer. Tr. 76-88.

Anthony Calf Looking and a friend were outside the liquor store. Calf Looking provoked a fight with petitioner and knocked him to the ground. Petitioner produced the pistol and fired at Calf Looking, who fled. Petitioner and his friends returned to their truck and left. Tr. 92-95.

Several moments later, petitioner stopped at an abandoned gas station where he met two other men. Petitioner fired at least one shot from the pistol at the gas station. Police officers arrived, arrested petitioner, and took him into custody. The police found the pistol in the pickup truck. At the police station, the police seized several rounds of 9mm ammunition and a spent 9mm casing from petitioner's pocket. Tr. 190.

2. a. Petitioner was charged in a three-count indictment with violations of 18 U.S.C. 922(g)(1), 924(c), 1153 and 113(c) (1988). J.A. 3-4. The Section 922(g)(1) count of the indictment alleged that, in 1993, petitioner possessed a semi-automatic pistol after having been convicted in 1989 of assault resulting in serious bodily injury, in violation of 18 U.S.C. 1153 and 113(f) (1988) (a crime punishable by more than one year's imprisonment). J.A. 3-4.

Petitioner filed a pre-trial motion *in limine* seeking to bar the government from informing the jury of his prior conviction, except to state that petitioner had been convicted of a crime punishable by imprisonment exceeding one year. Petitioner contended that disclosure of the identity of his prior felony conviction would unfairly prejudice the jury against him within the meaning of Federal Rule of Evidence 403, particularly with regard to the Section 924(c) and assault counts of the indictment. J.A. 7. Petitioner offered to stipulate that he had been

convicted of a felony, and he proposed that the jury be instructed that he "has been convicted of a crime punishable by imprisonment for a term exceeding one year." J.A. 11.[1]

The government opposed the motion and, relying on circuit precedent, declined petitioner's offer to stipulate. J.A. 12-13 (citing, *e.g.*, *United States* v. *Campbell*, 774 F.2d 354 (9th Cir. 1985)). At a pre-trial hearing, the district court denied petitioner's motion *in limine*. J.A. 16.

During voir dire, counsel for the government read the indictment, which identified petitioner's prior conviction as assault resulting in serious bodily injury. Tr. 25; J.A. 4. Later in the voir dire, petitioner's counsel advised the venire that petitioner had been convicted of assault resulting in serious bodily injury, and inquired whether the venire members could "keep an open mind and not just convict [petitioner]" based on his prior conviction. Tr. 40-41.[2]

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[1] The proposed jury instruction provided:

> The phrase "crime punishable by imprisonment for a term exceeding one year" generally means a crime which is a felony. The phrase does not include any state offense classified by the laws of that state as a misdemeanor and punishable for a term of imprisonment of two years or less and certain crimes concerning the regulation of business practices.
>
> In [*sic*] hereby instruct you that Defendant JOHNNY LYNN OLD CHIEF has been convicted of a crime punishable by imprisonment for a term exceeding one year.

Defendant's Proposed Instruction No. 7 (J.A. 11).

[2] The voir dire transcript does not indicate that any member of the venire responded to petitioner's counsel's inquiry. Tr. 41.

b. At trial, the government introduced into evidence a certified copy of the judgment and commitment order reflecting petitioner's prior conviction. J.A. 21. The order indicated the offense of which petitioner had been convicted and the sentence that petitioner received. J.A. 18-19. Petitioner objected to the introduction of the judgment and commitment order "based on the motion in limine [that he] filed prior to trial." J.A. 21. The court overruled the objection. *Ibid.*[3]

During its instructions to the jury, the district court referred to the prior conviction in its summary of the Section 922(g)(1) count of the indictment. It also instructed the jury that it could find petitioner guilty only if it found that he had previously been convicted of an offense punishable by imprisonment for more than one year, and that the offense of assault resulting in serious bodily injury was such an offense. Tr. 318-320.

The court instructed the jurors that they had heard evidence of petitioner's other acts, but that they could consider that evidence "only as it bears on the defendant's knowledge and intent and for no other purpose." Tr. 317. It further instructed the jurors that they could consider evidence of petitioner's prior conviction only as it affected petitioner's believability as a witness, and that "you may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." *Ibid.*

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[3] Counsel for the government also mentioned petitioner's prior offense during his opening and closing statements to the jury. Tr. 52, 282. Petitioner did not make a contemporaneous objection on either of those occasions.

After that charge, petitioner's counsel noted that petitioner had not testified in the case. Tr. 333.[4] The district court agreed to delete the language relating to the defendant's believability as a witness before submitting the final written instructions to the jury. Petitioner did not object to the court's corrective action. Tr. 335.[5] The jury found petitioner guilty on all three counts.

3. On appeal, petitioner contended that the introduction and admission into evidence of his prior assault conviction violated Rule 403 of the Federal Rules of Evidence, in light of his offer to stipulate to the existence of the prior felony conviction. Pet. C.A. Br. 9.[6] The court of appeals affirmed the convictions, but vacated petitioner's sentence.[7]

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[4] Petitioner had previously requested that the court instruct the jury as to the relevance of the prior conviction to petitioner's state of mind and credibility as a witness. See Pet. Proposed Jury Instructions Nos. 3 and 5.

[5] Petitioner renewed his motion *in limine* and again referred the court to his proposed jury instruction. Tr. 334. The court denied the motion and did not give the proposed instruction.

[6] Petitioner also appealed his convictions on the grounds that (1) the district court erred in failing to order the government to conduct a fingerprint comparison of a latent fingerprint found on the firearm; (2) the evidence was insufficient to support the convictions on the assault and using or carrying a firearm counts; (3) the district court failed to conduct a post-verdict voir dire; and (4) the district court improperly imposed a 57-month upward departure from petitioner's sentence under the Sentencing Guidelines. Pet. C.A. Br. 2. Those claims are not before this Court.

[7] On remand, the district court imposed the same 180-month sentence. J.A. 61-67. Petitioner's appeal of that sentence is currently pending in the court of appeals.

The court of appeals reviewed for abuse of discretion the district court's decision to admit petitioner's prior judgment and commitment order to establish the prior-conviction element of the Section 922(g) offense. The court observed that "[r]egardless of the defendant's offer to stipulate, the government is entitled to prove a prior felony offense through introduction of probative evidence." J.A. 50-51. In this case, the court held that the district court did not abuse its discretion in admitting the judgment. J.A. 51.

SUMMARY OF ARGUMENT

I. Prior conviction of a crime punishable by imprisonment for a term exceeding one year is an essential element of the offense created by Section 922(g). Because petitioner's prior judgment and commitment order conclusively established that element, it was unquestionably relevant to his guilt. Petitioner's argument that the "nature" of his prior felony was not "'inherently' relevant" to the prior-conviction element of Section 922(g) (Pet. Br. 16) misconceives the operation of the Federal Rules of Evidence. Relevancy under Rule 401 pertains to particular items of evidence, not to abstract concepts such as the "nature" of a prior offense. The evidence here was relevant because it showed that petitioner had been convicted of a crime covered by Section 922(g). The firearms disability under Section 922(g) does not apply to all prior convictions. Rather, it excludes certain business crimes and state misdemeanors punishable by less than two years' imprisonment. The fact that Section 922(g) applies to many different predicate crimes does not render irrelevant proof that petitioner was convicted of a particular covered crime.

Nor does a party's offer to stipulate to a material fact render actual evidence of that fact irrelevant. So long as the proffered evidence has a "tendency to make the existence of [a material fact] more probable * * * than it would be without the evidence," Fed. R. Evid. 401, it may not be excluded on grounds of irrelevance. Petitioner's prior judgment of conviction clearly satisfies that test.

II. Federal Rule of Evidence 403 affords the district courts broad discretion in weighing the probative value of evidence against the danger of unfair prejudice raised by that evidence. *United States* v. *Abel*, 469 U.S. 45, 54 (1984). The district court in this case did not abuse that considerable discretion in admitting petitioner's prior judgment of conviction. Because conviction of a prior offense is an element of Section 922(g), every jury that hears a Section 922(g) case will necessarily be made aware that the accused is a convicted offender. In so defining the Section 922(g) offense, Congress definitively struck the Rule 403 balance in favor of the admission of proof of a defendant's prior conviction. As a consequence, the relevant inquiry in a Section 922(g) case in which the defendant offers to stipulate to the existence of a prior felony is whether the additional potential for unfair prejudice posed by extrinsic evidence of the prior offense substantially outweighs the probative value of that evidence. The structure and legislative history of Section 922(g) indicate that Congress contemplated that specific evidence of a defendant's prior conviction would ordinarily be admitted.

The district court's decision to admit the judgment of conviction was properly informed by the traditional presumption that the government may not be compelled to accept a defendant's stipulation to the exis-

tence of an element of the charged offense in lieu of introducing evidence on that element. The rule that petitioner proposes—under which the government would be obligated to accept a defense offer to stipulate in virtually every Section 922(g) prosecution—would turn the traditional rule on its head. Moreover, the premise of petitioner's rule is that a stipulation is an adequate replacement for actual proof. Acceptance of that broad premise could allow criminal defendants to stipulate away all but the most hotly contested aspect of the charged offense. Such a practice, however, would limit the jury's role to resolving abstract, isolated factual questions, and would fundamentally impair the effectiveness of the prosecution's case in a wide variety of contexts.

The district court's decision here that the probative weight of the judgment of conviction tipped the balance in favor of admission was not an abuse of discretion. Because petitioner's proposed jury instruction would not have required the jury to treat the prior-conviction element as established, his stipulation could not substitute for probative evidence in the Rule 403 balancing analysis. In addition, the incremental risk of prejudice posed by the judgment of conviction was minimal. Although the prior offense was similar to two of the charged offenses, the government's proffer was non-inflammatory and did not reveal the facts underlying the prior offense. Nor was petitioner's prior offense a heinous or infamous crime likely to evoke an emotional response from the jury. When balanced against the prior judgment's overwhelming probative value on an essential element of the charged offense and the availability of petitioner's requested limiting instructions, the incre-

mental danger of prejudice did not require exclusion of the challenged evidence.

ARGUMENT

I. THE PRIOR JUDGMENT OF CONVICTION WAS RELEVANT TO ESTABLISH PETITIONER'S GUILT UNDER 18 U.S.C. 922(g)(1)

Section 922(g)(1) of Title 18 makes it unlawful for a person "who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year * * * to * * * possess in or affecting commerce, any firearm." Section 921(a)(20) of Title 18 provides, in pertinent part, that "[t]he term 'crime punishable by imprisonment for a term exceeding one year' does not include * * * any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or * * * any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." In order to establish a violation of Section 922(g)(1), it is therefore necessary for the government to establish, as an essential element of the offense, the defendant's conviction of a qualifying prior crime. In order to establish that a prior conviction qualifies under Sections 922(g)(1) and 921(a)(20), the government must establish not only the length of the authorized sentence, but also certain aspects of the "nature" of the prior offense. In this case, the government established the prior-conviction element through introduction of the judgment and commitment order that reflected petitioner's conviction of a qualifying offense. That evidence constituted "relevant evidence" within the meaning of the Federal Rules of Evidence.

1. Rule 401 of the Federal Rules of Evidence provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Because the judgment and commitment order conclusively established that petitioner had previously been convicted of a qualifying offense—an essential element of Section 922(g)—it was unquestionably relevant to prove his guilt. The judgment and commitment order showed not only that petitioner had a prior conviction, but also that it was for an offense covered by Section 922(g). Section 922(g)'s prohibition is applicable not to all "crime[s] punishable by more than one year's imprisonment," but only to crimes that are not excluded from the definition of that phrase in 18 U.S.C. 921(a)(20). See pp. 16-20, *infra*. The information about the nature of petitioner's prior offense was thus relevant to show that he was previously convicted of a covered crime. See *United States* v. *Breitkreutz*, 8 F.3d 688, 691 n.4 (9th Cir. 1993) ("[W]hile the underlying facts of the felony may not be relevant, the conviction judgment or other proof—which may state the nature of the conviction—most certainly is.").

Petitioner contends (Pet. Br. 16) that "[t]he nature of the prior felony conviction is not 'inherently' relevant to the prior felony conviction element of [Section] 922(g)(1)." That claim misconceives the concept of relevancy. That concept applies to the relation between particular items of evidence and issues to be proved, not to abstract concepts or ideas such as the "nature" of an offense. As the Advisory

Committee's Note to Rule 401 makes clear, "[r]elevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Here, the judgment and commitment order, including its identification of petitioner's prior offense, was relevant to an issue to be proved. While it is true that Section 922(g)(1) applies to a great many prior crimes, it does not apply to all of them. Petitioner's prior conviction of a particular covered offense was, therefore, a fact "of consequence" in the proceeding, and a judgment and commitment order showing such a conviction was documentary evidence that tended to prove that fact.

That a variety of crimes might satisfy the prior-conviction element does not detract from the relevance of the particular conviction used to establish it in petitioner's trial. The same principle is illustrated by the evidence that was admitted to prove another element of the Section 922(g) offense at petitioner's trial—possession of a "firearm." Petitioner committed the charged offenses by possessing a 9mm semi-automatic pistol. Although the identity of that particular firearm is not a specific element of the Section 922(g) offense, there is no doubt that evidence of the handgun itself was highly relevant to establish petitioner's violation of Section 922(g).

Similarly, where a defendant is charged with possession of a controlled substance, the jury is typically instructed as a matter of law that a named substance (*e.g.*, cocaine or methamphetamine) is a controlled substance under the pertinent criminal statute. The jury must then determine whether the government proved beyond a reasonable doubt that the defendant in fact possessed that named substance. Evidence

that reveals the identity of the particular substance allegedly possessed by the defendant is unquestionably relevant to that determination.

2. A party's offer to stipulate to a particular fact does not make other evidence offered to prove that fact irrelevant. To the contrary, it is well established that evidence may be relevant even if the underlying fact is not contested. "[T]he prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle* v. *McGuire*, 502 U.S. 62, 69 (1991). As the Advisory Committee's Note to Rule 401 explains:

> The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. * * * A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission.

Accordingly, whether or not petitioner was prepared to concede that he had previously been convicted of a qualifying crime, evidence that established that point remained "relevant evidence" within the meaning of Rule 401.

3. Contrary to petitioner's suggestion (Pet. Br. 7, 20), the fact that evidence of his prior conviction would have been inadmissible if offered "to prove [his]

character * * * in order to show action in conformity therewith," Fed. R. Evid. 404(b), does not deprive that evidence of its relevance to prove an element of the charged offense. Rule 404(b) "generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case." *Huddleston* v. *United States*, 485 U.S. 681, 685 (1988). The Rule makes clear that other crimes evidence may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Where, as here, a prior conviction is an element of the charged offense, its admission is not barred by Rule 404(b). And, as this Court has observed, "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." *United States* v. *Abel*, 469 U.S. 45, 56 (1984).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION UNDER FEDERAL RULE OF EVIDENCE 403 IN ADMITTING THE PRIOR JUDGMENT OF CONVICTION

Federal Rule of Evidence 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." That provision affords the district courts "wide discretion" in deciding whether to admit or exclude evidence. *United States* v. *Abel*, 469 U.S. at 54. The "broad contours" of Rule 403 are not well suited to categorical legal judgments, *United States* v. *Layton*, 767 F.2d 549, 554 (9th Cir. 1985), and the trial court is typically "in a better position to evaluate all the circumstances" pertinent to the Rule 403 balancing analysis than is an appellate court, *United States* v. *Birney*, 686 F.2d 102, 106-107 (2d Cir. 1982). See also 1 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 93, at 473-477 (2d ed. 1994); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 401[01], at 401-10 (1995). Accordingly, "[t]he usual approach on the question of admissibility on appeal is to view both probative force and prejudice most favorably towards the proponent, that is to say, to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." 1 Weinstein & Berger, *supra*, ¶ 403[03], at 403-49 to 403-51 (citing, *e.g.*, *Unitea States* v. *Brady*, 595 F.2d 359, 361 (6th Cir.), cert. denied, 444 U.S. 862 (1979)). See also Weinstein & Berger, *supra*, ¶ 403[03], at 403-51 (noting that the "thrust" of the Federal Rules of Evidence favors admissibility). The trial court's decision should not be overturned unless it "did not fall within the ambit of reasonable debate." *United States* v. *Currier*, 821 F.2d 52, 55 (1st Cir. 1987).

In light of that deferential standard of review, the admission of the judgment and commitment order showing petitioner's prior conviction as part of the government's case should be upheld. First, the structure and history of Section 922(g) indicate that documentary or testimonial evidence establishing the existence of a prior, covered conviction will normally be a feature of the prosecution's case. Second, a defendant's offer to stipulate to an element of an offense is one factor under Rule 403; it does not automatically require the court to exclude more vivid forms of proof. Finally, on the facts of this case, the district court's admission of the prior-conviction evidence was not an abuse of discretion.

A. The Structure And Legislative History Of Section 922(g) Support Admission Of Evidence Of The Particular Offense Of Which The Defendant Was Convicted

Conviction of a prior offense is an element of Section 922(g) that the government must prove beyond a reasonable doubt. Accordingly, every jury that hears a Section 922(g) case will necessarily learn that the accused is a convicted offender. In defining the offense so as to require proof of a prior conviction, Congress thus necessarily intended that proof of a defendant's prior conviction would come before the jury and that it may not be excluded as unfairly prejudicial under Rule 403.[8] See, *e.g.*, *United States* v. *Driggs*, 823 F.2d 52, 54-55 (3d Cir. 1987) (exclusion of evidence is abuse of discretion where evidence is necessary to prove an essential element of the offense); 1 Weinstein & Berger, *supra*, ¶ 401[01], at 401-18 ("Whether or not a fact is of consequence is determined not by the rules of evidence but by substantive law.").

The question before the district court in a prosecution under Section 922(g), therefore, is whether the additional danger of prejudice posed by disclosure of the identity of the defendant's prior crime substantially outweighs the probative value of that evidence. The structure and development of Section 922(g) strongly support the conclusion that actual evidence of a defendant's prior conviction should not ordinarily be excluded based on that incremental danger of

[8] Petitioner concedes (Pet. Br. 21 n.7), as he must, that, because Congress made a prior conviction an element of the Section 922(g) offense, "the jury must be told that the accused is a convicted felon in order for [the] offense to be proven."

prejudice. Just as Congress intended that juries be made aware of a Section 922(g) defendant's status as a convicted felon, Congress necessarily contemplated that juries would ordinarily learn the identity of the defendant's prior offense.

Section 922(g)(1) criminalizes firearm possession by "any person * * * who has been convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year." As Congress well knew, a crime is not an abstract or metaphysical concept; it is "an act or the commission of an act that is forbidden or the omission of a duty that is commanded by a public law." *Webster's Third New International Dictionary* 536 (1986). A prior conviction therefore connotes not only felon status, but specific past conduct. Accordingly, just as a Section 922(g) prosecution will involve evidence that a defendant possessed a *particular* firearm, Congress undoubtedly understood that evidence of a *particular* prior offense would typically be introduced to prove that element.[9]

In enacting Section 922(g) and its predecessor provisions, Congress focused considerable attention on the types of prior offenses that would trigger Section 922(g)'s coverage. Section 922(g) had its genesis in the Federal Firearms Act, ch. 850, § 2, 52 Stat. 1251

[9] That conclusion is bolstered by the traditional presumption, discussed at pages 21-28, *infra*, against imposing mandatory stipulations on the government in lieu of permitting actual proof. It is exceedingly unlikely that, in enacting Section 922(g), Congress contemplated a rule that the United States would be required to stipulate away an element of the offense whenever the defendant believed that such a course would benefit him. To the contrary, Congress almost certainly assumed that physical evidence conveying both the fact and the identity of a defendant's prior offense would typically be introduced.

(1938) (formerly codified at 15 U.S.C. 902(f) (1964)), which made it "unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year * * * to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

In 1968, Congress enacted the Gun Control Act, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. 921 *et seq.*), and the Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, Tit. VII, 82 Stat. 236-237 (formerly codified at 18 U.S.C. App. 1201 *et seq.* (1970)). The 1968 enactments recodified the possession and receipt provision of former 15 U.S.C. 902(f) (1964) into 18 U.S.C. App. 1202(a) (1982), which criminalized firearm possession by "[a]ny person who * * * has been convicted by a [federal, state, or local court] of a felony," and 18 U.S.C. 922(h) (1982), which prohibited the receipt of firearms by a person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year." At the same time, Congress chose to exclude certain "commercial-type crimes" from the definition of "crime[s] punishable by imprisonment for a term exceeding one year." S. Rep. No. 1097, 90th Cong., 2d Sess. 112-113 (1968). As originally enacted, Section 921(a)(20) provided:

> The term "crime punishable by imprisonment for a term exceeding one year" shall not include (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices as the Secretary may by regulation designate, or (B) any State offense (other than one involving a firearm or explosive) classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. 921(a)(20) (1970).

In 1986, as part of the Firearms Owners' Protection Act (FOPA), Congress consolidated the possession provisions into the present Section 922(g), and it again redefined the prior offenses that fall within that prohibition. Section 921(a)(20) now provides:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the

person may not ship, transport, possess, or receive firearms.

18 U.S.C. 921(a)(20).[10]

As its evolution indicates, Section 922(g) does not merely criminalize firearm possession by "felons."[11] Rather, it disables convicted offenders from subsequently possessing or transferring firearms, based on the characteristics of their prior offenses. Thus, not only the fact, but the identity of a defendant's prior offense is critical to the operation of Section 922(g). In light of the structure and history of Section 922(g), Congress necessarily contemplated that jurors would ordinarily receive substantive evidence of the defendant's prior offense.[12]

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[10] The FOPA altered the prior-conviction definition in four respects: (1) it made the courts, rather than the Treasury Secretary, the final arbiter as to what constitutes a "similar offense relating to the regulation of business practices"; (2) it excluded state firearms misdemeanors punishable by two years' imprisonment or less; (3) it added the requirement that a "conviction" be determined in accordance with the law of the jurisdiction in which the underlying proceeding was held; and (4) it generally excluded any convictions for which the defendant received a pardon, civil rights restoration, or expungement of the record. See S. Rep. No. 583, 98th Cong., 2d Sess. 7 (1984).

[11] Section 922(g) reaches certain defendants who were previously convicted of misdemeanors, 18 U.S.C. 921(a)(20)(B), and it exempts from its coverage defendants who were previously convicted of certain felonies, 18 U.S.C. 921(a)(20)(A).

[12] Whether a particular conviction qualifies under Section 921(a)(20) is a question of law. See *United States* v. *Flower*, 29 F.3d 530, 532 (10th Cir. 1994) ("Whether a prior conviction meets the definition of [Section] 921(a)(20), and is therefore properly admitted in a [Section] 922(g)(1) case, is an ultimate legal determination to be decided by the trial judge."). Juries

B. The United States May Not Ordinarily Be Compelled To Accept A Defendant's Stipulation To The Existence Of An Element Of The Charged Offense In Lieu Of Introducing Evidence

This Court has never addressed the issue of whether a defendant's offer to stipulate to an element of an offense may justify precluding the admission of actual evidence to establish that element.[13] "[T]he weight of authority," however, "is that the criminal accused cannot 'plead out' an element of the charged offense by offering to stipulate to that element." E. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the*

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in Section 922(g)(1) cases are typically instructed that a particular crime falls within the statutory prohibition, and that they must decide, based on the evidence, whether the defendant was previously convicted of that crime. See, *e.g.*, 1A L. Sand, et al., *Modern Federal Jury Instructions* ¶ 35.07[2], at 35-87 (1995) ("The government contends that the defendant was convicted of [insert crime] in state (*or* federal) court. I charge you that as a matter of law, [insert crime] is a crime punishable by imprisonment for a term exceeding one year. However, it is for you to determine beyond a reasonable doubt if the defendant was convicted of this crime.") (brackets in original).

[13] In 1992, the Court granted the petition for a writ of certiorari in *Hadley* v. *United States*, No. 91-6646. 503 U.S. 905. Among the questions presented by the petition in *Hadley* was: "Should the accused citizen be allowed to stipulate that the requisite 'intent' exists in a criminal case in order to remove a technical issue of 'intent' as a disputed issue at trial when the accused citizen's sole defense at trial is that he or she did not commit the acts charged in the indictment?" Petition for a Writ of Certiorari at i, *Hadley* v. *United States*, No. 91-6646. After briefing and oral argument, the Court dismissed the writ of certiorari as improvidently granted. 506 U.S. 19 (1992).

Criminal Accused as a Denial of Equal Protection, 40 Emory L.J. 341, 357-358 (1991). See also C. Wright & K. Graham, *Federal Practice and Procedure* § 5194, at 198-199 (1978) (collecting cases).[14] That rule has added force where, as here, the evidence that the government seeks to introduce constitutes, by itself, an element of the offense. See, *e.g.*, *United States* v. *Gantzer*, 810 F.2d 349, 351 (2d Cir. 1987); *United States* v. *Campbell*, 774 F.2d 354, 356 (9th Cir. 1985); *Parr* v. *United States*, 255 F.2d 86, 88 (5th Cir.), cert. denied, 358 U.S. 824 (1958). Because the defen-

[14] A strong presumption against mandatory imposition of defense stipulations was also the majority rule before the adoption of the Federal Rules of Evidence. In a seminal case, *Parr* v. *United States*, 255 F.2d 86, 88, cert. denied, 358 U.S. 824 (1958), the Fifth Circuit stated:

> It is a general rule that "A party is not required to accept a judicial admission of his adversary, but may insist on proving the fact." 31 C.J.S. Evidence § 299, p. 1068. The reason for the rule is to permit a party "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight." Dunning v. Maine Central Railroad Co., 91 Me. 87, 39 A. 352, 356, 64 Am.St.Rep. 208. Such a rule, we think, should apply in a case such as this where the [items] offered in evidence are of the gist of the offense charged rather than descriptive or illustrative of a scene or an occurrence.

See also *United States* v. *Mishkin*, 317 F.2d 634, 638 (2d Cir.) (citing *Parr*), cert. denied, 375 U.S. 827 (1963); *United States* v. *Brickey*, 426 F.2d 680, 686 (8th Cir.) (same), cert. denied, 400 U.S. 828 (1970); *Alire* v. *United States*, 313 F.2d 31, 34 (10th Cir. 1962) (same), cert. denied, 373 U.S. 943 (1963); but see *United States* v. *Grassi*, 602 F.2d 1192, 1196 (5th Cir. 1979) (*Parr* rule "is not a blanket prohibition against compelling the government to accept a defendant's stipulation"), vacated on other grounds, 448 U.S. 902 (1980).

dant's tactical decision not to contest an element of a crime does not relieve the prosecution of the burden of proving it, *Estelle* v. *McGuire*, 502 U.S. at 69, the government should rarely be required to accept a defendant's offer to stipulate in lieu of putting on its proof.

1. The rule that petitioner proposes—requiring the government to accept a defendant's offer to stipulate to his prior conviction in virtually every prosecution under Section 922(g) (Pet. Br. 32-39)—would turn the traditional rule on its head. It would replace the broad freedom of the district court to balance the probative value of evidence against its prejudicial effect in a particular case with a categorical rule. Such a holding would be a significant departure from the usual workings of Rule 403.

Petitioner's proposal, if accepted, could not easily be limited to the prior-conviction element of Section 922(g)(1). Because, in his view, actual evidence will generally have only incremental probative value when compared with a stipulation, the logic of petitioner's rule would allow criminal defendants to stipulate away all but the most hotly contested aspect of the charged offense, leaving juries to resolve abstract, isolated questions, rather than the defendant's innocence or guilt. See *United States* v. *Breitkreutz*, 8 F.3d at 692. Such a rule is not required by the Federal Rules of Evidence, and is contrary both to the courts' historical approach to stipulations and to Congress's intent in enacting the framework of firearms control provisions of which Section 922(g) is a part.

Contrary to petitioner's contention (Pet. Br. 39-43), numerous valid reasons exist for the government to decline to enter into a stipulation in a particular case.

It has been recognized that "[a] cold stipulation can deprive [the government] of the legitimate moral force of [its] evidence, and[] can never fully substitute for tangible, physical evidence or the testimony of witnesses." *United States* v. *Allen*, 798 F.2d 985, 1001 (7th Cir. 1986) (citation and internal quotation marks omitted); accord *United States* v. *Pedroza*, 750 F.2d 187, 201 (2d Cir. 1984) ("A party is normally permitted to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might . . . rob the evidence of much of its fair and legitimate weight.") (internal quotation marks omitted); *United States* v. *Ellison*, 793 F.2d 942, 949 (8th Cir.), cert. denied, 479 U.S. 937 (1986); 9 J. Wigmore, *Evidence* § 2591, at 589 (3d ed. 1940). Stipulations frequently fail to convey the breadth of information contained in physical evidence or live testimony, and do not facilitate the permissible factual inferences that jurors frequently must make from the evidence presented. Cf. 1 Weinstein & Berger, *supra*, ¶ 402[02], at 402-11 ("A law suit involves numerous propositions which cannot be viewed or proved in isolation."). In addition, defendants' proffered stipulations are frequently incomplete, "conditional or so qualified as to impair the effectiveness of the prosecution's case." Wright & Graham, *supra*, § 5194, at 199 (footnote omitted).

A stipulation is not evidence, but rather an agreement between the parties. See 9 J. Wigmore, *Evidence* § 2588, at 821 (Chadbourn rev. ed. 1981); 2 *McCormick On Evidence* § 254, at 142 (4th ed. 1992). Accordingly, it must normally be accompanied by an instruction to the jury that explains its meaning and effect. A stipulation to an element of a criminal offense presents particular difficulties because its

effect is to relieve the government of its legal duty to prove that element beyond a reasonable doubt. See, *e.g.*, *United States* v. *Branch*, 46 F.3d 440, 442 (5th Cir. 1995). An instruction concerning the effect of such a stipulation therefore must clearly and unequivocally inform the jury that the government has met its burden of proving that element, while preserving the defendant's right to a presumption of innocence. The potential for juror confusion is high where, because of a stipulation, the government introduces no evidence to prove an essential element of the offense.[15]

A stipulation is particularly likely to impair the effectiveness of the government's case when it purports to remove from the jury's consideration a considerable portion of the material issues to be litigated, leaving the jury to resolve a seemingly abstract proposition. For example, the offense of assault resulting in serious bodily injury in violation of 18 U.S.C. 113(a)(6) may be established by proving "a threat to inflict injury upon the person of another which, when

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[15] Stipulations may also generate legal issues regarding whether the court improperly invaded the province of the jury. See *United States* v. *Jones*, 65 F.3d 520, 521, 523-524 (holding that instruction that "[s]ince defendant admits that he was previously convicted of a felony, you will find that the government has established this element of the offense" improperly invaded the role of the jury and required reversal), opinion vacated on grant of rehearing en banc, 73 F.3d 616 (6th Cir. 1995). While we believe that the panel erred in *Jones*, that decision illustrates the potential for claims of error arising out of instructions that seek to give weight and meaning to stipulations. Of course, absent instructions that provide such weight and meaning, juries may be unable to conclude that the stipulation is sufficient to meet the government's burden of proof.

coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." *United States* v. *Loera*, 923 F.2d 725, 728 (9th Cir.), cert. denied, 502 U.S. 854 (1991). Under petitioner's theory, a defendant could require the government to stipulate to his intent and ability to harm the victim, and to the fact that the victim experienced fear of bodily harm, leaving the jury to hear evidence only on the abstract question whether such fear was reasonable. Because actual evidence tending to show the other elements of the offense could be marginally prejudicial—when compared with a bare stipulation—such evidence would be excluded under petitioner's reading of Rule 403. It is evident, however, that such a construction of Rule 403 would fundamentally impair the effectiveness of the government's case, and lead to substantial jury confusion, in a wide variety of criminal prosecutions.

2. The problems we describe above are fully implicated when the defendant offers to stipulate to the existence of a prior conviction in a Section 922(g) case. As this Court has noted, "there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples* v. *United States*, 114 S. Ct. 1793, 1799 (1994). Accordingly, if the government fails to present affirmative evidence that the defendant was convicted of another offense before the charged possession occurred, the jury "may wonder why [the defendant's] possession was illegal. Doubt as to the criminality of [the defendant's] conduct may influence the jury when it considers the possession element." *United States* v. *Barker*, 1 F.3d 957, 960 (1993) (quoting *United States* v. *Collamore*, 868 F.2d 24, 28 (1st Cir. 1989)), modified, 20 F.3d 365 (9th Cir. 1994). As a consequence, especially where the defendant is unwilling to link a proffered stipulation with a definitive jury instruction regarding the jury's proper role, the government should be free to decline the offer to stipulate and to admit actual proof.

It is also frequently the case that evidence of the identity of the defendant's prior conviction will be relevant and admissible for other purposes than to establish the prior-conviction element of the offense. For example, when a defendant testifies at trial, he is subject to impeachment by his prior felony conviction under Federal Rule of Evidence 609. See, *e.g.*, *United States* v. *Jacobs*, 44 F.3d 1219, 1224 (3d Cir.), cert. denied, 115 S. Ct. 1835 (1995); *United States* v. *Tracy*, 36 F.3d 187, 191-194 (1st Cir. 1994), cert. denied, 115 S. Ct. 1717 (1995); 3 Mueller & Kirkpatrick, *supra*, § 279, at 272. In other cases, the prior conviction may be relevant under Rule 404 to prove an element of the offense apart from the defendant's status.[16] See, *e.g.*, *United States* v. *Rubio*, 727 F.2d 786, 797-798 (9th Cir. 1983) (prior drug conviction was relevant to show that the defendant engaged in pattern of drug racketeering activity, and was admissible despite the defendant's offer to stipulate to felon status).

As the Advisory Committee's Note to Rule 403 explains, "[t]he availability of other means of proof may * * * be an appropriate factor" in balancing the probative value of an item of evidence against its potential for unfair prejudice. The Advisory Committee has further recognized that the admission of

[16] Even those circuits that generally require the prosecution to accept a defense stipulation in Section 922(g) cases recognize that such acceptance should not be required where the "other crimes" evidence could be introduced for other purposes in the course of the trial. See, *e.g.*, *United States* v. *O'Shea*, 724 F.2d 1514, 1516 (11th Cir. 1984).

relevant evidence offered "to prove a point conceded by the opponent * * * should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403)." Fed. R. Evid. 401 advisory committee's note. Consistent with those principles, where a defendant offers an unconditional stipulation, coupled with an adequate proposed jury charge, the trial court should consider the availability of the stipulation as one of the many factors in the Rule 403 balancing analysis. See, *e.g.*, *United States* v. *Allen*, 798 F.2d at 1001; *United States* v. *Grassi*, 602 F.2d 1192, 1195-1197 (5th Cir. 1979), vacated on other grounds, 448 U.S. 902 (1980). That consideration should, of course, be informed by the historical presumption against forced stipulations, and by the particularized concerns of juror confusion and evidentiary effectiveness discussed above.

If, however, either the proposed stipulation or the accompanying proposed jury charge is incomplete or equivocal, the defense's proffer should not be considered in the Rule 403 calculus. That is because an incomplete or inadequate "judicial admission" of an element of the offense cannot substitute for actual evidence of a material fact. See, *e.g.*, *United States* v. *Pedroza*, 750 F.2d at 201 (although defendant's offer to stipulate that ransom was sought to pay for narcotics "might have lessened the government's need for extensive evidence of the antecedent cocaine transaction," the offered stipulation was an inadequate substitute for actual evidence of the defendant's motive). The government should not be deprived of the opportunity to make its case through the introduction of probative evidence absent procedural assurances that the jury will treat the stipulated matter as proven beyond a reasonable doubt.

C. The District Court Acted Within Its Broad Discretion In Refusing To Impose Petitioner's Proposed Stipulation On The Government And In Admitting The Judgment Of Conviction Into Evidence

The district court in this case correctly declined to impose petitioner's stipulation on the government. Petitioner offered to stipulate to the existence of an essential element of the charged offense. As we have explained, compelling the government to accept a stipulation, and to forgo the admission of actual evidence, is least appropriate when the stipulation would replace all proof of an element of a crime. In addition, although petitioner's proposed stipulation was not conditional, the proposed jury instruction was inadequate. Petitioner's proposed jury instruction (J.A. 11) would not have instructed the jury either that the government should be considered to have proved the prior-conviction element beyond a reasonable doubt, or that, if it found that petitioner had possessed a firearm, it was required to convict him of the Section 922(g)(1) count. See also Pet. Proposed Jury Instruction No. 22 ("[Petitioner's] plea of not guilty puts in issue each of the essential elements of the offenses described in these instructions and imposes on the Government the burden of establishing each of these elements by proof beyond a reasonable doubt."). And, apparently because of Section 921(a)(20)'s focus on offense characteristics, petitioner's Proposed Jury Instruction No. 7 employed a complex and circuitous definition of the prior-conviction element that was highly likely to confuse the jury. See note 1, *supra*; J.A. 11.

Nor did the district court abuse its discretion in holding that the potential unfair prejudice from the

introduction of petitioner's prior judgment of conviction did not substantially outweigh the probative value of that evidence. Here, an incremental risk of prejudice may have arisen because two of the crimes with which petitioner was charged—assault with a dangerous weapon and using or carrying a firearm during a violent crime—had some similarities to the prior offense of assault resulting in serious bodily injury. Admission of evidence of the prior assault conviction presented the potential that the jury might improperly surmise that, having committed an assault in the past, petitioner was more likely to have done so again.[17]

The similarity between a prior offense and the crime of which the defendant is presently accused is relevant to the Rule 403 analysis. Such similarity is not dispositive, however. See, *e.g.*, *United States* v. *Booker*, 706 F.2d 860, 862 (8th Cir.) (admission of evidence conveying identity of prior crime not abuse of discretion, despite similarity between prior crime and charged offense), cert. denied, 464 U.S. 917 (1983). Here, the risk of prejudice was minimal. The evidence of petitioner's prior offense was limited to a certified copy of the judgment and commitment order. J.A. 21. The government's proffer was not inflamma-

[17] That is the general form of inference that Rule 404(b) bars, by preventing the introduction of "other crimes" evidence "to prove the character of a person in order to show action in conformity therewith." See *United States* v. *Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) (Breyer, J.) (Rule 404(b) "codifies the common law doctrine forbidding the prosecution from asking the jury to infer from the fact that the defendant has committed a bad act in the past, that he has a bad character and therefore is more likely to have committed the bad act now charged").

tory and did not reveal the facts underlying the prior offense. In addition, although petitioner had been convicted of several prior felony offenses, the government introduced evidence of only one prior conviction. Petitioner's prior offense (assault resulting in serious bodily injury) was not a heinous or infamous crime likely to evoke an emotional response from the jury.

The judgment of conviction was introduced as direct evidence of an element of the charged offense, and was clearly the most probative evidence available to demonstrate that element. In addition, the evidence was not cumulative, because it was the only evidence that the government introduced to prove that element of the offense. On balance, while the method by which the prior conviction was introduced "did not prevent *all* prejudice to [petitioner] * * *, [it] did, in our opinion, ensure that the admission of this highly probative evidence did not *unduly* prejudice [petitioner]." *United States* v. *Abel*, 469 U.S. at 54-55.

Potential prejudice may also be addressed by limiting instructions. Federal Rule of Evidence 105 provides that when evidence is admissible for one purpose but not another, "the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Here, as in other settings, limiting instructions may protect against the potential for unfair prejudice resulting from the introduction of prior convictions. See *Huddleston* v. *United States*, 485 U.S. at 691; *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967). At petitioner's request, the district court in this case gave limiting instructions.[18] The instruc-

[18] The district court initially instructed the jury that it could consider evidence of petitioner's other acts "only as it bears on

tions at issue were largely inapplicable because petitioner did not testify at trial, and because evidence of his prior offense was not introduced under Rule 404. The instructions did not leave the jury free, however, to consider petitioner's prior conviction as evidence of a criminal or violent character. Indeed, the court instructed the jury that it "may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." Tr. 317. As applicable to the Section 924(c) and assault counts, that charge mitigated the potential prejudice from the introduction of the prior judgment of conviction. See *Shannon* v. *United States*, 114 S. Ct. 2419, 2427 (1994) ("almost invariable assumption of the law [is] that jurors follow their instructions"). Although the charge did not entirely apply to the Section 922(g)(1) count, it certainly did not suggest an improper basis on which to convict petitioner.[19]

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the defendant's knowledge and intent and for no other purpose." Tr. 317. The court further instructed the jury that it could consider evidence of petitioner's prior conviction only as it affected petitioner's believability as a witness, and that "you may not consider a prior conviction as evidence of guilt of the crime for which the defendant is now on trial." *Ibid.* Because petitioner did not testify, at petitioner's request, the district court removed the credibility instruction from its final written charge. Tr. 335.

[19] Petitioner now argues (Pet. Br. 40-41) that the district court's limiting instructions were inadequate. But because petitioner himself urged the district court to give them, see Pet. Proposed Jury Instructions Nos. 3 and 5, he is barred by the "invited error" rule from seeking to reverse his conviction based on those same instructions. See, *e.g.*, *United States* v. *Staufer*, 38 F.3d 1103, 1109 (9th Cir. 1994); *United States* v. *Herrera*, 23 F.3d 74, 75 (4th Cir. 1994).

Finally, petitioner argues (Pet. Br. 48) that "the trial judge failed to consider any alternative remedies to stipulation."[20] The district court, however, issued its evidentiary ruling in response to petitioner's objection and motion *in limine*. Petitioner's motion proposed to substitute a stipulation and jury instruction for extrinsic evidence of his prior conviction. J.A. 7. He did not move to redact the judgment of conviction. See *United States* v. *Holland*, 880 F.2d 1091, 1094-1095 (9th Cir. 1989) (defendant's "blanket objection" to the admission of an audiotape "d[id] not preserve an objection to failure to redact the tape"); *Lonergan* v. *United States*, 95 F.2d 642, 646 (9th Cir. 1938); see also Fed. R. Evid. 103(a)(1) & advisory committee's note (rule requiring articulation of "the specific ground of objection" intended "to alert [the trial judge] to the proper course of action and enable opposing counsel to take proper corrective measures"). Although it was within the district court's discretionary authority to order redaction sua sponte, its failure to do so did not constitute an abuse of discretion.[21]

---

[20] Petitioner also suggests (Pet. Br. 31) the existence of an "'unfair spillover effect' of the *joinder* of the [Section] 922(g)(1) count with the other counts." (Emphasis added); see also *id.* at 8, 24. Petitioner did not seek severance of his offenses before trial pursuant to Federal Rule of Criminal Procedure 14, nor did he seek review of the joinder of his offenses in the court of appeals or in his petition for certiorari. He is therefore precluded from raising that claim at this juncture. See *Lebron* v. *National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).

[21] In a Section 922(g) case in which the district court determines, upon a properly framed objection, that the potential unfair prejudice from particular prior-offense evidence substantially outweighs the probative value of that evidence, the

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

ALAN JENKINS
Assistant to the Solicitor General

THOMAS E. BOOTH
Attorney

MAY 1996

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court should permit redaction rather than requiring the government to accept a defendant's stipulation. Cf. *United States* v. *Tavares*, 21 F.3d 1, 5 (1st Cir. 1994) (en banc) (reversing Section 922(g) conviction based on improper evidence of nature of prior conviction, but noting that "the prosecution ordinarily cannot be forced to accept a stipulation if it prefers to introduce a judgment of conviction properly redacted").

APPENDIX

Federal Rule of Evidence 401 provides:

> **Definition of "Relevant Evidence"**
>
> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rule of Evidence 402 provides:

> **Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Federal Rule of Evidence 403 provides:

> **Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 404(b) provides:

> **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

18 U.S.C. 922(g) provides:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * * * *
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. 921(a)(20) provides:

> The term "crime punishable by imprisonment for a term exceeding one year" does not include—
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

(1)

No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

ANTHONY R. GALLAGHER
Federal Defender for the District of Montana

*DANIEL DONOVAN
Assistant Federal Defender

Federal Defenders of Montana
#9 Third Street North, Suite 302
P. O. Box 3547
Great Falls, Montana 59403-3547
(406) 727-5328
Counsel for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION: CONCESSIONS BY THE GOVERNMENT

The government makes three significant concessions. First, the government concedes that it may be required to stipulate to a defendant's status as a felon in a § 922(g)(1) case: "Consistent with those principles, where a defendant offers an unconditional stipulation, coupled with an adequate proposed jury charge, the trial court should consider the availability of the stipulation as one of the many factors in the Rule 403 balancing process." Brief for the United States at 28. The government agrees that Petitioner Old Chief made an "unconditional" stipulation. *Id.* at 29. Although the government now argues that Old Chief's proposed jury instruction was "inadequate," the government never advanced this argument in the lower courts, particularly in the district court when defense counsel would have been more than happy to revise the jury instruction to take into account the government's concerns.

Second, the government agrees that Old Chief's prior assault conviction created the danger of unfair prejudice: "Admission of evidence of the prior assault conviction presented the potential that the jury might improperly surmise that, having committed an assault in the past, petitioner was more likely to have done so again." Brief for the United States at 30. Despite this concession, and like the trial court, the government failed to employ the Rule 403 balancing process. Contrary to the government's contention, the trial court *never held* "that the potential for unfair prejudice from the introduction of petitioner's

prior judgment did not substantially outweigh the probative value of that evidence." *Id.* at 29-30. The trial court simply ruled that "[i]f he [the prosecutor] doesn't want to stipulate, he doesn't have to." J.A. at 16. At a minimum, the trial court should have engaged in a 403 balancing. By failing to engage in a balancing test, the trial court abused its discretion. Despite its best efforts, the government has failed to establish that the nature of Old Chief's prior felony conviction was "highly probative evidence," or even probative at all, in comparison to its prejudicial effect.

Third, although it criticizes Old Chief's proposed jury instructions and even contends that defense counsel "invited error", the government admits that "[t]he instructions at issue [concerning Rules 404(b) and 609] were largely inapplicable because petitioner did not testify at trial, and because evidence of his prior offense was not introduced under Rule 404." Brief for the United States at 31-32. If jurors are assumed to follow their instructions (*Shannon v. United States, id.* at 32), the jury had to be confused because they were not properly and carefully instructed. Defense counsel was not given the opportunity to object to the trial court's instructions until *after* they were read to the jury. If the stipulation requested by Old Chief had been accepted by the government, there would have been no confusion at all. Having rejected the stipulation and insisted that the jury hear about the prior assault conviction, the government cannot now complain of hypothetical juror confusion. The government cannot rectify the trial court's abuse of discretion.

II. ARGUMENT

A. Evidence of the Nature of the Prior Felony Conviction is Immaterial and, thus, Inadmissible in a Felon in Possession of a Firearm Case

In defining "relevant evidence," Fed. R. Evid. 401 contains two separate elements. The government's assertion that "information about the nature of petitioner's prior offense was * * * relevant to show that he was previously convicted of a covered crime" (Brief for the United States at 11) misconstrues the meaning of relevant evidence because the government ignores the materiality prong of the definition of relevancy. Rule 401 codifies in a single standard the two separate relevancy requirements of probative worth and materiality. *See* 1 Louisell and Mueller, *Federal Evidence* (1st ed. 1977) § 95 pp. 672-673. The name and nature of a prior conviction do not show anything about whether the prior conviction was punishable by a term of imprisonment exceeding one year. The specific name and nature of the prior offense are therefore immaterial to the issue of whether the accused had been convicted of a crime punishable by a term of imprisonment exceeding one year.

The Fifth Circuit in *United States v. Hall*, 653 F.2d 1002, 1005 (5th Cir. 1981), has clearly explained the two components of relevancy under Rule 401:

> The essential prerequisite of admissibility is relevance. Fed. R. Ev. 402. To be relevant, evidence must have some "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* 401. Implicit in that definition are

two distinct requirements: (1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action. McCormick on Evidence § 185, at 435 (2d Ed. 1972); 1 Weinstein's Evidence 401[03], at 401-13 (1980); 22 Wright & Graham, Federal Practice and Procedure: Evidence § 5162, at 18 (1978). Whether a proposition is of consequence to the determination of the action is a question that is governed by the substantive law. Simply stated, the proposition to be proved must be part of the hypothesis governing the case – a matter that is in issue, or probative of a matter that is in issue, in the litigation. McCormick on Evidence, *supra*, § 185, at 434; 1 Weinstein's Evidence, *supra*, ¶ 401[03].

See also, *United States v. Bagley*, 473 U.S. 667, 703 fn. 5 (1985) (Marshall, J., dissenting) ("If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." quoting E. Cleary, *McCormick on Evidence* § 185 (3d ed. 1984)). For the name and nature of the prior felony conviction to be relevant in a § 922(g)(1) prosecution, the government must establish that they are of consequence to the determination of the action.

Whether evidence is of consequence to the determination of the action (materiality) depends on "the elements of the offenses charged and the relevant defenses (if any) raised to defeat criminal liability." *Hall*, 653 at 1005, citing 1 *Weinstein's Evidence*, ¶ 401[03], at 401-11 (1980). The matter in controversy or element in issue in a § 922(g)(1) case is whether the accused previously had been convicted of a crime punishable by a term of

imprisonment exceeding one year. The statute does not specify that a particular kind of offense is required to prove guilt. The name and nature of the prior conviction are simply not of consequence to a determination of this element. The name and nature of the prior conviction are thus immaterial and, therefore, irrelevant. *See* Petitioner's Opening Brief at 10-15.

The government contends that the name and nature of a prior conviction are relevant because some prior convictions are excludable from § 922(g)(1) by 18 U.S.C. § 921(a)(20). However, Old Chief's prior felony assault conviction is not excludable by § 921(a)(20). Furthermore, as the government establishes, whether a particular conviction is excluded by § 921(a)(20) is a question of law and is a decision to be made by the trial judge. Brief for the United States at 20 fn. 12; *See also, United States v. Grinkiewicz*, 873 F.2d 253, 258 (11th Cir. 1989). More importantly, the trial court in Old Chief's case instructed the jury, as a matter of law, that his predicate felony is a crime punishable by imprisonment for a term exceeding one year:

> With respect to the first element set forth above, I instruct you that the offense of Assault Resulting in Serious Bodily Injury is a crime in the federal courts of the United States punishable by imprisonment for more than one year.

J.A. 34. With this instruction, the only remaining question was whether Old Chief had been convicted of said offense – an issue which Old Chief could not disprove and which he conceded. Thus, with a minor change in the instruction given, the trial court could easily have eliminated the prejudice to Old Chief by excluding from the

instructions any reference to the name and nature of the prior assault conviction. The following instruction would have eliminated unfair prejudice and would not have impeded the government's case at all:

> With respect to the first element set forth above, I instruct you that the Defendant, Johnny Lynn Old Chief, has been convicted of a crime in the federal courts of the United States punishable by imprisonment for more than one year.

This, of course, would not have eliminated all prejudice because, having denied Old Chief's motion in limine, the trial court allowed the prosecutor to tell the jury that Old Chief had been convicted of a prior assault.

In sum, evidence of the name and nature of Old Chief's prior conviction was neither necessary, material, strictly in terms of Rule 401, nor relevant.

B. The Rule Adopted by the First Circuit in *Tavares* does not Prevent the Government from Making a Full Presentation of Proof of the Crime of Felon in Possession of a Firearm

Having failed to explain why evidence of the nature of the prior felony conviction was material or necessary in Old Chief's case, or why such evidence is material or necessary in any § 922(g)(1) case, the government raises the alarm that a ruling by this Court in favor of Old Chief "would allow criminal defendants to stipulate away all but the most hotly contested aspect of the charged offense, leaving juries to resolve abstract, isolated questions, rather than the defendant's innocence or guilt." Brief for the United States at 23. Despite its best efforts to

demonstrate that a rule eliminating evidence of the nature of a prior conviction in a § 922(g)(1) case would be the end of the world for government prosecutors,[1] a careful review of the rule proposed by Old Chief, as adopted and explained by the First Circuit in *United States v. Tavares*, 21 F.3d 1, 3-6 (1st Cir. 1994) (*en banc*), allays this parade of horribles to the level of the boy who cried wolf. The rule in no way leads to the result suggested by the government.

The *Tavares* court articulated the rule as follows: the government is required to accept a defendant's stipulation as to the defendant's status as a felon in a § 922(g)(1) prosecution and is prohibited from introducing evidence about the nature of the prior felony unless the trial court finds that the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice. 21 F.3d at 5. This rule would not limit the government from presenting the name, nature and details of a prior felony conviction when such information has "relevance independent of simply proving prior felony status * * * " such as when such evidence is admissible under Rule 404(b) or Rule 609. *United States v. Wacker*, 72 F.3d

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[1] "[A] cold stipulation can deprive [the government] of the legitimate moral force of [its] evidence" (Brief for the United States at 24); it would "impair the effectiveness of the prosecution's case" (*Ibid.*); it would leave "the jury to resolve a seemingly abstract proposition" (*Id.* at 25); " * * * a naked admission might * * * rob the evidence of much of its fair and legitimate weight" (*Id.* at 24); it would "lead to substantial jury confusion in a wide variety of criminal prosecutions" (*Id.* at 26); and would allow a defendant to "require the government to stipulate to [a defendant's] intent * * * " (*Ibid.*).

1453, 1473 (10th Cir. 1995). In adopting the rule from *Tavares*, the Tenth Circuit recognized that, under the rule, "* * * the prosecution retains broad discretion to introduce the underlying circumstances of a crime when those circumstances are truly relevant to the prosecution of the case." (*Ibid.*)

The narrow scope of the *Tavares* rule precludes it from being applied to any situations outside the status as a felon element in § 922(g)(1) cases. Unless the 403 balancing test is met, that is, unless the probative value of evidence is substantially outweighed by the danger of unfair prejudice, the government is not restricted from introducing evidence of the intent (*mens rea*) or actions of defendant (*actus reus*). The rule does not restrict the application of Rules 404(b) and 609. As stated by the First Circuit, the right of the government to present a full picture of the offense is "in no fashion weakened by requiring a stipulation to establish the defendant's status as a felon * * * [t]he predicate crime is significant only to demonstrate status, and a full picture of that offense is, even if not prejudicial, beside the point." 21 F.3d at 4. Finally, the prosecution cannot "ordinarily" be forced to accept a stipulation if it "prefers to introduce a judgment of conviction properly redacted." *Id.* at 5.

C. Although the Prosecutor Did Not Present the Nature of Old Chief's Prior Assault Conviction in an Inflammatory Manner, the Prosecutor's Soft Sell Approach Nonetheless Created Undue Prejudice

The government suggests that presenting evidence of the nature of Old Chief's prior felony was minimally prejudicial because its offer "was not inflammatory and did not reveal the facts underlying the prior offense." Brief for the United States at 30-31. At the same time, the government admits that "[a]dmission of evidence of the prior assault conviction presented the potential that the jury might improperly surmise that, having committed assault in the past, petitioner was more likely to have done so again." *Id.* at 30. The government cannot escape the similarities between the two offenses. The prior conviction was for assault resulting in serious bodily injury; the current charge was assault with a dangerous weapon. The prior conviction was relatively recent, having occurred in the same federal court in 1989.

The prosecutor did not need more for the jury to make improper use of the nature and name of Old Chief's prior conviction. Even if it was a "soft sell," it was an effective one. The jury was repeatedly reminded of the prior felony assault throughout the trial.[2] Compare,

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[2] The government argues that the defense somehow waived the right to argue that the trial court should have considered remedies other than stipulation because Old Chief did not move to redact the judgment of conviction. Brief for the United States at 33. However, once the trial court denied the motion in limine, thereby allowing statements, testimony and

United States v. Jones, 67 F.3d 320, 324 (D.C. Cir. 1995). ("[A]lthough the district court gave limiting instructions, the nature of the prior felony was repeatedly brought to the jury's attention by the judge and the prosecutor.") The obvious did not need to be stated: If you have any doubt about whether Old Chief assaulted Anthony Calf Looking with this gun, well, you know he has assaulted other(s) before – if he did it before, he must have done it again.

Finally, the government points out how fair and just it was because it "introduced evidence of only one prior conviction." Brief of the United States at 31. Was it mere coincidence that the one prior conviction selected by the government was highly similar in nature to the new assault count? The United States exalts form over substance!

This Court must read between the lines of the government's brief. There is nothing there which in any way justifies introducing evidence of the nature of Old Chief's prior conviction. The refusal to stipulate revealed that the prosecution believed the judgment and conviction had prejudicial value, and it rendered nonexistent any otherwise legitimate interest the government might have had in wanting the jury to know about Old Chief's prior assault. *See* Petitioner's Opening Brief at 43.

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evidence of Old Chief's prior assault, a mere redaction of the judgment of conviction would not have prevented the jury from learning of the prior assault. It was mentioned at least five separate times during the trial including twice in the jury instructions which were both read, and submitted in writing, to the jury. Petitioner's Opening Brief at 5-6.

III. CONCLUSION

For the foregoing reasons, and those stated in our Opening Brief, the judgment of the United States Court of Appeals for the Ninth Circuit must be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted,

ANTHONY R. GALLAGHER
Federal Defender for the District of Montana

*DANIEL DONOVAN
Assistant Federal Defender

Federal Defenders of Montana
#9 Third Street North, Suite 302
P. O. Box 3547
Great Falls, Montana 59403-3547
(406) 727-5328
Counsel for Petitioner

*Counsel of Record

(8)

No. 95-6556

In The

Supreme Court of the United States

October Term, 1995

JOHNNY LYNN OLD CHIEF,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

TOVA INDRITZ
Counsel of Record
320 Gold Avenue, SW, Suite 800
Albuquerque, New Mexico 87102
(505) 242-4003

BARBARA BERGMAN
University of New Mexico
School of Law
1117 Stanford NE
Albuquerque, New Mexico 87131
(505) 277-3304

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

If the defendant in a felon in possession of a firearm case offers to stipulate to his status as a felon, should the district court require the government to accept the stipulation and preclude the government from introducing evidence of the nature of the prior felony?

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a national organization of criminal defense attorneys dedicated to promoting the fair administration of criminal justice and ensuring due process for persons accused of crime. NACDL has over 8,700 members and 74 state and local affiliate criminal defense bar associations with over 25,000 members.

This case poses an issue of significant concern to *amicus curiae*, namely, whether a person charged with being a felon in possession of a firearm who is willing to stipulate or admit the offense element of being a felon, a status in itself cloaked with social opprobrium, can still have the irrelevant details of the nature of the prior, often years-past, felony set before the jury which will determine guilt or innocence in the current case. As an organization of defense attorneys, *amicus curiae* brings to the Court experience about the practical effects of the introduction of such prior conviction information.

Both parties consented to the filing of this brief, as reflected in letters lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

When a defendant charged with being a felon in possession of a firearm offers to stipulate or admit that he has previously been convicted of a felony, that stipulation or admission constitutes complete proof of the element of the prior felony and the judge can instruct the jury that it must accept that element of the offense as proven.

Because the nature of the prior felony is never relevant to the fact of whether the defendant has such a felony conviction, this stipulation or admission completely eliminates any justification for the government to offer evidence concerning the conviction. The details of the prior felony can only serve a non-permissible purpose, such as showing bad character or prior bad conduct. Finally, because the nature of the prior felony in these circumstances has no probative value whatsoever, such information will always be more prejudicial than probative.

This Court can fashion various alternative remedies to the problem. The government can be required to stipulate; the trial court can accept an admission in lieu of a stipulation; the court can require the government to redact the indictment and any documentary proof to strike the nature of the prior felony and similarly limit testimony. In some cases, a severance of counts may be a remedy, although that may still not solve the problem. In other cases, a bifurcated trial procedure may be appropriate. This Court can either establish an appropriate procedure, leave to the trial courts to select from an array of alternatives, or allow trial courts to use their own creativity to avoid the injustice of exposing the nature of the past felony.

ARGUMENT

I. THE NATURE OF A PRIOR FELONY IS NOT RELEVANT EVIDENCE IN A FELON IN POSSESSION OF A FIREARM CASE.

There are three elements in a prosecution for felon in possession of a firearm in violation of 18 U.S.C. § 922(g): first, whether the person has previously been convicted of a felony, that is, a crime punishable by imprisonment for a term exceeding one year; second, whether the person possessed the firearm, and third, whether the firearm had been in or affecting interstate commerce.

Fed. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

As several Circuits considering the problem have observed, the exact nature of the prior felony does not make more or less probable the existence of a prior conviction. *United States v. Tavares*, 21 F.3d 1, 4 (1st Cir. 1994); *United States v. Wacker*, 72 F.3d 1453, 1472 (10th Cir. 1996) (as modified). The *Wacker* court specifically noted:

> Whereas the fact of a defendant's prior felony conviction is material to a felon in possession charge, the nature and underlying circumstances of a defendant's conviction are not. . . . The details of the defendant's prior crime do not make it "more probable or less probable" that the defendant is a convicted felon. . . . Rather, this information tends only to color the jury's perception of the defendant's

character, thereby causing unnecessary prejudice to the defendant.

72 F.3d at 1472. Thus, the nature of the felony is simply irrelevant to any issue in a felon in possession of a firearm prosecution.

II. IF A DEFENDANT OFFERS TO STIPULATE OR ADMIT TO THE FACT OF A PRIOR FELONY, THE ONLY PURPOSE FOR REJECTING THE OFFER AND ALLOWING THE PROSECUTION TO PROVE THE NATURE OF THE PRIOR CRIME IS TO SHOW THAT THE DEFENDANT IS A BAD PERSON, A PURPOSE OTHERWISE PROHIBITED BY THE RULES OF EVIDENCE.

Fed. R. Evid. 404 embodies a longstanding principle of American jurisprudence, namely, that a person should be judged guilty or not guilty only on evidence of whether he or she committed the crime now charged. That rule provides:

> Rule 404. Character Evidence not Admissible to Prove Conduct; Exceptions; Other Crimes
>
> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> . . .

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. . . .

Evidence that a defendant charged solely with being a felon in possession of a firearm previously committed another gun crime, or a crime of violence, or any particular type of crime, cannot be admitted to prove that he or she is likely to have committed the crime of felon in possession of a firearm or to show that he or she is a person of bad moral character and thus predisposed to be a felon in possession of a firearm. Nor may evidence of the nature of this previous felony conviction be admitted to show that a person, such as Mr. Old Chief, who is charged with felon in possession of a firearm along with other crimes is, therefore, more likely to be guilty of the other crimes charged.

Here Johnny Lynn Old Chief was on trial for three charges, felon in possession of a firearm (Count I), using or carrying a firearm during commission of a violent crime (Count II), and assault with a dangerous weapon (Count III). Had he only been on trial for the charge of assault with a dangerous weapon (or even assault plus using or carrying a firearm during a crime of violence), the prosecution would not have been permitted to inform the jury that Mr. Old Chief had previously assaulted someone else and been convicted of that charge in federal court. Rule 404(b) would have precluded admission of the fact that he had previously been convicted of assault. Yet because the assault charge was joined in the indictment with the felon in possession of a firearm charge, despite

Mr. Old Chief's willingness to stipulate to the prior felony element of the charge in Count I, the government was able to inform the jury that Mr. Old Chief had been convicted in federal court of assault resulting in serious bodily injury on a different individual four years earlier. Such evidence would serve only to show that he is a person of bad character or to show that, having assaulted someone four years ago, he is more likely to have assaulted someone on the occasion in question. Both those purposes are specifically precluded by Rule 404(b). No juror can reasonably be expected to compartmentalize his or her mind to consider the prior assault only on Count I, and not consider it as to Counts II and III.

III. THE PREJUDICIAL EFFECT OF ADMITTING THE NATURE OF THE PRIOR FELONY VASTLY OUTWEIGHS ANY NEGLIGIBLE PROBATIVE VALUE OF THE JURY KNOWING THE NATURE OF THE PRIOR FELONY CRIME.

Fed. R. Evid. 403 excludes even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Advisory Committee Notes on this rule define "unfair prejudice" as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

As the First Circuit wrote in *United States v. Melvin*, 27 F.3d 703, 707 (1st Cir.), *modified on other grounds*, 27 F.3d 710 (1st Cir. 1994), "evidence regarding the nature of the

prior felony is precisely the type of evidence which prejudices a jury." The court went on to note that "[t]his evidence of prior convictions would prejudice almost any jury in these circumstances, no matter how conscientious." *Id.* at 709. It is fundamental to the fairness of the jury trial system that the court sift and screen out evidence that jurors do not need to evaluate the guilt or innocence of the charged crime but would have the effect of injecting emotional prejudice.

The likelihood of prejudice is magnified in some cases, such as this one, where the defendant is charged with the same type of crime as the prior felony. As the Fourth Circuit held in *United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979), evidence of a prior gun offense clearly prejudiced defendant's trial on charges of illegally possessing a gun and being a felon in possession of a firearm.

> The prejudice against appellant in permitting the jury to be apprised of the nature of Poore's prior felony conviction by the use of unnecessary language descriptive of that felony conviction contained in Count II is clear. The prior felony conviction was for "carrying a handgun," the same type of firearm offense with which appellant is being charged in this case. Despite the district court's precautionary instructions, we recognize that "to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime." *United States v. Foutz*, 540 F.2d 733, 736 (4th Cir. 1976). Therefore, we must conclude that it was not unlikely that the jury, being apprised of the fact that appellant had previously been convicted of a like firearms offense, considered that fact in passing on his guilt or innocence of

> the offenses charged in this case. Any such consideration, of course, would be improper. To prevent such prejudice from occurring, the district court should have stricken the objectionable language from Count II of the indictment.

Id. at 41-42 (footnote omitted).

In this case, the prejudicial effect of this inappropriately admitted evidence was compounded by repetition. The jury heard about Mr. Old Chief's prior assault resulting in serious bodily injury five different times: during reading of the indictment for voir dire (Tr. 25), during the prosecutor's opening statement (Tr. 52), when a certified copy of the prior conviction was introduced into evidence during the government's case-in-chief (J.A. 21; Tr. 74-75), during the prosecutor's closing argument (Tr. 282), and again during jury instructions (J.A. 33, 34).

Although not present in this case, other unfairly prejudicial effects would result if this Court were to approve a rule allowing the government to introduce evidence of the nature of the defendant's prior felony conviction when the defendant is willing to stipulate to the fact of conviction. For example, the prior felony may be for a heinous and especially socially despised felony, such as in *United States v. Kemper*, 503 F.2d 327, 328 (6th Cir. 1974), *cert. denied*, 419 U.S. 1124 (1975), where the prior felony was "interstate transportation of a female for the purpose of having her practice prostitution and for other immoral purposes." In *United States v. Jones*, 67 F.3d 320 (D.C. Cir. 1995), the defendant's prior conviction was for possession with intent to distribute cocaine, a crime of great social concern.

The previous felony itself may suggest a trail of more than one prior conviction, as for when the felony is for escape from federal custody as in *United States v. Spletzer*, 535 F.2d 950 (5th Cir. 1976), for assault on one's federal probation or parole officer in violation of 18 U.S.C. § 1114, or for committing an assault while incarcerated in a federal correctional institution.

Where it is not barred by appropriate enforcement of Fed. R. Evid. 404 or by applicable caselaw, the government may seek to increase the prejudice by proving a series of prior felonies. It is the official policy of the Department of Justice to do so. *See Department of Justice Manual*, Vol. 9A, Title 9, Criminal Division, Part 3A, § 9-63.513 (1993-2 Supp.). In *United States v. Wacker*, 72 F.3d 1453, 1471 n.14 (10th Cir. 1996) (as modified), for example, one defendant had prior convictions for possession with intent to distribute marijuana, two counts of murder, and one count of aggravated assault with a deadly weapon. The government introduced evidence of all four prior felonies to prove that the defendant was a convicted felon (to prove that element of the charge of felon in possession of a firearm) despite the defendant's offer to stipulate to the prior felony convictions.

Finally, the prior felony may be very old, as there is no time limit on the post-felony conviction ban on possession of a firearm. That a defendant committed a heinous act thirty years before should not be used to invite jurors to infer that his or her current lifestyle is anti-social. The evidence at trial should be limited to the proof that is relevant to the current charge.

IV. THIS COURT CAN FASHION REMEDIES THAT WILL ALLOW THE JURY TO KNOW THE FACT THAT A DEFENDANT HAS A PRIOR FELONY BUT PRECLUDES THE NON-RELEVANT AND PREJUDICIAL INFORMATION OF THE NATURE OF THAT PRIOR FELONY.

Courts confronting this problem have responded with various solutions. The simplest resolution of this issue is to require that, when the defendant is willing to stipulate that he or she has a prior conviction for a crime punishable by imprisonment for a term exceeding one year, the government be required to so stipulate. The court then would strike the language descriptive of the nature of the prior felony from the indictment. *Poore*, 594 F.2d at 43. The court also would preclude reference in the proof and argument to the nature of the prior felony. Then the trial court would instruct the jury that while the crime has three elements that must be proved beyond a reasonable doubt, the jury must accept that the first element of a prior felony has been so proved.

The Tenth Circuit took that approach in *United States v. Wacker*, 72 F.3d 1453, 1472-73 (10th Cir. 1996) (as modified):

> [W]e hold that where a defendant offers to stipulate as to the existence of a prior felony conviction, the trial judge should permit that stipulation to go to the jury as proof of the status element of section 922(g)(1), or provide an alternate procedure whereby the jury is advised of the fact of the former felony, but not its nature or substance. *See Tavares*, 21 F.3d at 4 (citing other non-prejudicial alternatives). Correspondingly, in those situations where the defendant is willing to concede the existence of the prior felony conviction, the trial judge should ordinarily preclude the government from introducing any evidence as to the nature or substance of the conviction, as the probative value of this additional information generally will be overshadowed by its prejudicial effect under Federal Rule of Evidence 403.

Alternatively, if the defendant is willing to admit the prior felony, by written signed admission or otherwise, even absent concurrence from the prosecutor, the same procedure should be required. The Court could require the admission to be signed by the defendant as well as defense counsel and the admission would be read to the jury by counsel, the court, or a clerk, and the jury similarly instructed that the admission must be accepted as proof of the prior felony element.

Finally, the fact, but not the nature, of a prior felony could be presented to the jury by affidavit of a document custodian or by redacted judgment documents, followed by similar instructions to the jury. *See, e.g., Wacker*, 72 F.3d at 1472 ("The majority of the circuits . . . hold that evidence concerning the nature of the predicate crime in a felon in possession case is irrelevant and prejudicial. Such evidence should therefore be excluded if possible by use of a redacted record, stipulation, affidavit, or other similar technique whereby the jury is informed only of the fact of a prior felony conviction, but not of the nature or substance of the conviction.").

A more cumbersome solution is a bifurcated trial, with the jury first deciding whether the elements of possession of a firearm and the interstate commerce nexus

have been proved beyond a reasonable doubt, and only then having a second factfinding proceeding to determine the prior felony element.

Where a defendant is charged with counts in addition to the felon in possession of a firearm charge, the trial court could grant severance of the felon in possession count unless the nature of the prior felony is independently admissible. *United States v. Busic*, 587 F.2d 577 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980).

> Courts have held that joinder of an ex-felon count with other charges requires either severance, bifurcation, or some other effective ameliorative procedure. *See, e.g., United States v. Joshua*, 976 F.2d 844 (3d Cir. 1992) (bifurcated trial is appropriate when government joins felon in possession count with other charges and proof of felony would not be admissible at trial on other counts); *United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992) (district court abused its discretion in failing to grant bifurcated trial or to fashion other procedures sufficient to curb prejudice from inclusion of ex-felon count); *United States v. Desantis*, 802 F. Supp. 794, 803 (E.D.N.Y. 1992) (court ordered severance of ex-felon count because of manifest danger of prejudice).

United States v. Jones, 16 F.3d 487, 492 (2d Cir. 1994). However, while this method eliminates the prejudice to the defendant on the other counts, it does not eliminate the prejudice on the felon-in-possession count.

A trial court also could give the government a choice. If the government were unwilling to enter into a stipulation telling the jury only the fact of the former conviction

and the court was reluctant to force the government to accept the stipulation, then the court could order severance of the felon-in-possession charge. *See, e.g., United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992) (trial court may order severance of felon-in-possession charge where government refuses to enter into a stipulation that advises the jury merely of the fact of the former conviction).

None of these remedies weakens the government's legitimate interest in presenting its case. Indeed, the presentation is strengthened by the court's definitive instruction to the jury that one element of the crime must be accepted as proved. In such a case, the court would not give the usual instruction to the jury that they should consider whether or not the government has proven that element beyond a reasonable doubt.

CONCLUSION

Whether this Court desires to outline possible remedies or leave those to the trial court, the National Association of Criminal Defense Lawyers urges this Court to rule that when a defendant offers to stipulate or otherwise admits that he has a prior felony conviction, the jury may not be informed of the nature of the conviction in any fashion (through the language of the indictment, evidence, argument, jury instruction, or otherwise).

Respectfully submitted,

TOVA INDRITZ
Counsel of Record
320 Gold Avenue, SW, Suite 800
Albuquerque, New Mexico 87102
(505) 242-4003

BARBARA BERGMAN
University of New Mexico
School of Law
1117 Stanford NE
Albuquerque, New Mexico 87131
(505) 277-3304

Attorneys for *Amicus Curiae*
The National Association of
Criminal Defense Lawyers